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IN THE

Supreme Court of the United States

October Term, 1967

No. 1090

AARON HENRY,

Petitioner,

v.

THE STATE OF MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

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No.

AARON HENRY,

Petitioner,

v.

THE STATE OF MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi, entered July 10, 1967.

Opinion Below

The final opinion of the Supreme Court of Mississippi is reported at 202 So. 2d 40 and is printed in Appendix A hereto *infra,* at page 1a. A preliminary opinion and a separate opinion of that court, printed in Appendix A hereto *infra,* at pages 4a and 14a are reported at 198 So. 2d 213. The opinion of the County Court of Bolivar County, is unreported; it is printed in Appendix B hereto *infra,* at page 20a. An opinion of the court below rendered after remand of this action and reported in 174 So. 2d 348, is printed in Appendix C hereto *infra,* at page 24a. The opinion of the Mississippi Supreme Court which this Court reviewed on certiorari is reported in 154 So. 2d 289 and is printed in Appendix D hereto, *infra,* at page 31a. A prior opinion of the court below, withdrawn upon rendition of that reported in 154 So. 2d, is unreported; it is printed in Appendix D hereto, *infra,* at page 45a.

Jurisdiction

The final judgment of the Supreme Court of Mississippi reversing the opinion of the County Court of Bolivar County, was entered on July 10, 1967. A suggestion of error was overruled on September 18, 1967. Jurisdiction to review the judgment of the Supreme Court of Mississippi is granted to this Court under the provisions of Title 28 U.S.C. § 1257(3). Applications for extensions of time to file this petition to and including January 26, 1968, and to and including February 6, 1968, were granted in orders issued by Mr. Justice Black, on December 15, 1967, and on January 24, 1968.

Questions Presented

1. Whether a criminal conviction, judicially determined to have been based solely upon evidence acquired as the result of an unreasonable search, violates petitioner's rights to due process of law where use of that evidence was objected to in a motion for directed verdict rather than a motion to exclude entered contemporaneously with admission of the evidence?

2. Whether, consistent with the due process clause of the Fourteenth Amendment after remand of a case for an evidentiary hearing on the question of waiver, the state Supreme Court whose jurisdiction terminated when it, in turn, remanded the case to the county court, may, without appeal by the State, review a finding in favor of petitioner and redetermine those facts adversely to petitioner?

3. Whether, after a finding of no waiver which would result in dismissal of the prosecution against petitioner, freedom from double jeopardy and due process permit a

court to redetermine facts and reverse the finding and reinstate a judgment of conviction?

4. Whether the due process clause permits a court to re-evaluate facts and render a decision that petitioner has waived the protection of the federal constitution, where that evaluation does not accord with federal standards?

5. Whether failure to apply to the evidentiary hearing, rules enunciated by the court below in an opinion rendered after remand by this Court and before remand to the trial court by the court below, denied petitioner equal protection of the laws?

6. Whether the due process clause permits a court to suspend disposition of petitioner's application for an order effectuating payment of costs awarded by a mandate of this Court?

7. Whether conviction of petitioner by a court, whose jurisdiction is derivative and defective by reason of the absence of an original affidavit, offends the due process clause of the Fourteenth Amendment?

8. Whether the due process and equal protection clauses of the Fourteenth Amendment allow a state to use criminal and judicial process, evidenced by the criminal conviction of petitioner unsupported by evidence of guilt, as a punitive measure?

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 1832, Mississippi Code of 1942, Ann.:

Practice in criminal cases—On affidavit of the commission of any crime of which he has jurisdiction lodged with a justice of the peace, he shall issue a warrant for the arrest of the offender returnable forthwith or on a certain day to be named and shall issue subpoenas for witnesses as in civil cases, and shall try and dispose of the case according to law; and, on conviction, shall order such punishment to be inflicted as the law provides.

3. This case also involves Section 1205, Mississippi Code of 1942, Ann.:

Papers transmitted to circuit clerk—The justice of the peace, or mayor, or police court from whose judgment convicting of a criminal offense an appeal shall be taken, shall at once transmit to the clerk of the circuit court the bond taken by him and a certified copy of his record of the case, with all the original papers in the case, as in appeals in civil cases. If an appeal be taken from a judgment convicting of a criminal offense, during a session of the circuit court of the county, the transcript and papers shall be returned to, and the case triable at that term of the court, and the bond shall bind the defendant accordingly, and the clerk of the circuit court shall docket the case on the state docket, and shall be entitled to like fees as in other cases. The justice of the peace, mayor, or police justice shall be liable for the amount of the bond, if he fail to require a good and sufficient one. If the justice of the peace shall fail to make up his transcript of the record and transmit the same to the circuit clerk within ten days after the appeal-bond is given, the circuit court shall disallow his court costs in the case.

4. This case also involves Section 1153, Mississippi Code of 1942, Ann.:

The state or any municipal corporation may prosecute an appeal from a judgment of the circuit court in a criminal cause in the following cases:

(1) From a judgment sustaining a demurrer to, or a motion to quash an indictment, or an affidavit charging crime; but such appeals shall not bar or preclude another prosecution of the defendant for the same offense.

(2) From a judgment actually acquitting the defendant where a question of law has been decided adversely to the state or municipality; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed, but the Supreme Court shall nevertheless decide the question of law presented.

(3) From a ruling adverse to the state or municipality in every case in which the defendant is convicted and prosecutes an appeal; and in such case the whole record shall be carried before the Supreme Court on the direct appeal, and the case shall be treated as if a cross appeal had been formally prosecuted by the state. All questions of law thus presented shall be decided by the Supreme Court.

Statement

1. Prior Proceedings

Petitioner is a pharmacist and President of the Coahoma County Branch of the National Association for the Advancement of Colored People and President of the N.A.A.C.P. State Conference of Branches; he resides in Clarksdale, Mississippi [PR. 202].[1] On May 22, 1962, he was convicted by the County Court of Bolivar County for disturbing the peace in violation of Sec. 2089.5, Miss. Code 1942, by making indecent proposals and gestures to a young hitchhiker [PR. 189-190]. The Circuit Court of Bolivar County affirmed the judgment without opinion.

[1] References to the record printed for the prior appeal of this case are designated as [PR.]. References to the record reflecting proceedings subsequent to remand by this Court are designated [R.].

On appeal, the Supreme Court of Mississippi reversed the conviction and remanded the case for a new trial on the ground that the admission of evidence vital to the charge preferred, was obtained by means of an unlawful search and prevented petitioner from obtaining a fair trial as guaranteed by the Mississippi Constitution (57a) [PR. 210]. At the close of the State's case, petitioner moved for a directed verdict, citing as one of the grounds, admission of testimony of a witness acquired in violation of the Fourth Amendment, the testimony was challenged as illegal and unlawful. The court below ruled that under ordinary circumstances the motion could not support a claim of error [PR. 209].[2] It relied on *Brooks* v. *State*, 209 Miss. 150, 46 So. 2d 94 which enunciated its rule that errors affecting fundamental rights are exceptions to the rule that prevents questions not raised at trial from being first raised on appeal [PR. 209].

The State filed a suggestion of error which was sustained and the prior opinion was withdrawn. In its second opinion, the court found that since petitioner "made no objection" to introduction of the tainted testimony at the time it was introduced, he waived his right to object and could not predicate error on the trial court's failure to exclude that evidenee from consideration of the jury [PR. 243-244]. It was noted that counsel were adequate and in such circumstances, "even if honest mistakes of counsel in respect to policy or strategy or otherwise occur, they are binding upon his client as a part of the hazards of courtroom battle" [PR. 244].

This Court granted certiorari, heard argument and on January 18, 1965, vacated the judgment of conviction and

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[2] It referred to representation by out-of-state counsel, who may not have been familiar with the local rules and its awareness that such situations cast unusual burdens on trial judges to determine how to eliminate objectionable testimony where no objection is made and simultaneously insure a fair trial and due process of law.

remanded for a hearing, the question "whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally-seized evidence" (379 U.S. 443). That opinion stated "only evidence extrinsic to the record can establish the fact of waiver and the State should have an opportunity to establish that fact"[2]. Thereafter, the State applied for and was denied rehearing (380 U.S. 926).

The mandate of this Court issued on March 2, 1965 ordered that petitioner recover from the State of Mississippi, One Thousand Three Hundred and Sixty-seven Dollars and Ninety-nine Cents ($1,367.99) "for his costs herein expended" [R. 182-183] and petitioner was advised that costs could be collected through the Supreme Court of Mississippi or directly from opposing counsel or parties. Upon request to the State, petitioner's counsel was advised that costs must be obtained by application to the Supreme Court of Mississippi.

On April 1, 1965, petitioner applied to the court below for an order directing the appropriate Mississippi officials to refund costs as directed in the mandate [R. 181]. The State filed a cross-motion for remand of the case to the trial court for a hearing on the waiver question [R. 189] and opposed the motion for costs. The opposing papers, filed on April 6, 1967, recited that on that day there was being forwarded to this Court a motion requesting withdrawal of the mandate and the striking of the award of costs to petitioner.[3] The State requested that petitioner's motion for payment of costs be denied or held in abeyance until disposition of the State's motion by this Court [R. 184-188].

These motions were considered by the court below and on April 19, 1965, an opinion was rendered "in an effort

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[3] On May 17, 1965, this Court denied the State's motion directed to the mandate and to costs (381 U.S. 908).

to comply with the suggestion" of this Court as to possible amelioration of the state-federal friction caused by *habeas corpus* proceedings and purposed "to find a procedural method whereby the state constitutional questions and the federal constitutional questions may be brought to the attention of the trial judge and . . . effectively preserved . . ." (27a-28a). The court held that (1) persons desiring to suppress evidence allegedly wrongfully seized may do so by a pre-trial motion to suppress; (2) that if such a pre-trial motion is not made, evidence may be stricken on state or federal grounds, by objection "to the introduction of the evidence . . . during the trial and before the defendant has offered his evidence"; (3) that failure to object to the testimony and failure to move to suppress it *until after the introduction of all the evidence for the State and defense* will be considered a waiver of both State and federal questions; and (4) that the foregoing procedural rules might be relaxed by the court to enforce constitutional rights in the interests of justice (emphasis supplied) (28a). The court then directed certification of:

> a mandate to the County Court of the Second Judicial District of Bolivar County, Mississippi, through the Circuit Court of that District, in which the County Court is directed to proceed—on reasonable notice to Aaron Henry—to determine whether or not he consciously and intentionally waived his rights to object to the illegally obtained evidence offered by the witness, Ben Collins. After having heard the evidence and determined the issue, the County Court will certify its findings and determination to this Court for further proceedings in compliance with the opinion of the United States Supreme Court. (23a)

An order of remand in those terms was entered [R. 201]. Petitioner's motion for payment of costs advanced was "continued and suspended pending the determination of the issue submitted to the County Court . . . " (30a).

The hearing on the question remanded was held before the County Court of Bolivar County on October 11, 1966, [R. 1]. On January 5, 1967, that court filed an opinion (20a) in which it found:

> (1) That there is no credible evidence to support the finding that Aaron Henry consciously waived his right to object to the evidence in question;
>
> (2) That the State did not sustain the burden of proof by a preponderance of the evidence or beyond a reasonable doubt that conscious waiver was made by his attorneys. (22a) [R. 69].

On January 24, 1967, the Supreme Court of Mississippi issued an order [R. 85A] reciting that "[u]pon preliminary consideration of the findings and determination of the County Court of . . . Bolivar County, . . . made for and on behalf of this Court pursuant to its mandate for the purpose of determining whether" [petitioner] . . . consciously and intentionally waived his right to object to [the] illegally obtained evidence" the parties were required to file informal statements or briefs "touching any matter pertinent to further proceedings of this Court" and requiring that there be discussed in those statements or briefs two questions:

> (1) Assuming the State had the burden of establishing the fact of waiver, did the evidence offered by the State meet the burden to the extent that the duty of going forward with the proof was upon the defendant?
>
> (2) What is the significance, if any, of the fact that the accused and his attorneys declined to testify?

Responses to this order were filed [4] and after argument, on April 20, 1967, the court below filed an opinion (4a) and a separate opinion (14a), in which it determined

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[4] Petitioner could not respond in full to the second question since the conclusion that counsel "declined to testify" was not based on fact or the record.

that although petitioner's motion for directed verdict in the original trial included as grounds the unlawful search and seizure of petitioner's car and the illegal testimony based thereon, petitioner failed to move to exclude the evidence. It concluded:

> . . . that the defendant, Aaron Henry, and his attorneys, did knowingly and consciously waive objection to the testimony obtained by the search of his automobile, with the permission of his wife, as to his rights under the Mississippi Constitution and the Constitution of the United States.

This decision reversed the trial court's findings of facts. The court below explained that the trial judge in this instance acted as a "facility or agent" for it, citing, as authority, Sec. 1960, Miss. Code Ann., and found that "the State met the burden of proving that [petitioner's] counsel deliberately waived objection to the evidence as a strategic move." It continued:

> The State produced all the evidence it had, and that evidence points clearly to a "waiver".
>
> All evidence to the contrary is within the sole possession of defendant and his counsel. They have not been willing to reveal what really took place at defendant's end of the counsel table. They should not now be heard to say that there was no waiver.

The opinion concluded:

> If this case were again before us, we would reaffirm our former opinion and judgment. (13a)

On April 20th, the court below entered an order reciting its finding that petitioner had waived his right to object and directing that the record on the hearing, the briefs and the court's opinion be certified to this Court [R. 136].

A timely suggestion of error filed by petitioner on May 2, 1967, was overruled on May 15, 1967 [R. 154], and on May 17, 1967, petitioner filed below, a notice of appeal to

this Court. Between these dates, the State of Mississippi filed with this Court a motion to reinstate the judgment of conviction and to retax costs. The motion was denied on May 17, 1967 (381 U.S. 908), and the applicant advised that further proceedings in this case be directed to "any new final judgment which may be entered by the Mississippi courts" (388 U.S. 901).

On June 15, 1967, the State of Mississippi filed in the court below a similar motion to reinstate judgment of conviction [R. 161-163]. Petitioner opposed the motion, incorporating all grounds set forth in his prior briefs and suggestion of error [R. 164] and on July 10, 1967, the court sustained that motion. The final opinion below recited the history of the case and concluded:

> We are now, therefore, of the opinion that our former opinion set forth in *Henry* v. *Mississippi*, 154 So. 2d 289 (1963), should be reinstated, and that the judgment of conviction of defendant, Aaron Henry, in the Circuit Court of Bolivar County, Mississippi, should be, and is, affirmed." (2a); [R. 165-167].

The court reinstated "the former judgment of the Circuit Court of the Second Judicial District of Bolivar County, Mississippi," entered on November 20, 1962, and "a sentence" that petitioner "pay a fine of $250.00 and . . . serve 60 days in jail . . ." and provided that the State of Mississippi recover from petitioner "all the costs of this appeal to be taxed" (3a); [R. 168]. Petitioner's suggestion of error [R. 169-173] was overruled on September 18, 1967 [R. 174].

Petitioner prays that this Honorable Court issue a writ of certiorari to review the judgment against him.

2. The Evidence Presented
Original Trial

Petitioner was arrested on March 3, 1962, and taken into custody by Ben Collins, the Chief of Police of Clarksdale, Coahoma County, Mississippi for the offense of dis-

orderly conduct allegedly committed in Bolivar County, Mississippi (PR. 62, 92-94, 1936). On March 14, 1962, he was tried before a Justice of the Peace, found guilty of disturbing the peace, fined $500 and sentenced to six months in jail (PR. 1). A trial *de novo* in the County Court of the Second Judicial District of Bolivar County, Mississippi, resulted in petitioner's conviction for violation of Section 2089.5, Mississippi Code 1942, Ann. (PR. 189-190). In both instances, trial was based upon an affidavit signed by the Bolivar County Prosecutor, neither on personal knowledge nor upon information and belief (PR. 3). The Justice of the Peace, before whom petitioner was tried, certified to the County Court that all original papers in this action were contained in the record of proceedings before him, as required by Section 1205, Mississippi Code of 1942, Ann. Certified to the County Court as original papers were one cost bond, one appeal bond, eight subpoenas *duces tecum*, one capias and one general affidavit dated March 14, 1962 (PR. 1).

The only witness testifying to commission of the offense was complainant, Sterling Lee Eilert, a white youth, 18 years of age at the time of the offense, who had dropped out of school in the tenth grade (PR. 26-27). He left his home in Memphis, Tennessee on March 3, intending to "hitch-hike" to Cleveland, Mississippi (PR. 15, 28). Eilert rode in three cars before he arrived in Clarksdale and at approximately 5:30 p.m. a Negro gave him his next ride, south along Highway 61 (PR. 16-17). Eilert was at all times seated next to the door on the right (PR. 40). The driver volunteered to go past Alligator, where he worked in a liquor store, and on to Shelby (PR. 38). As the car entered Shelby, and after making suggestive comments, the driver allegedly reached across and "grabbed" [Eilert's] "crotch" (PR. 22).

Eilert stated that he left the car, attempted a telephone call and then walked approximately one block to the Shelby

police station (PR. 23). As he left the telephone booth, he saw what he judged to be the same car turn from east or west to the north, towards Alligator and Clarksdale (PR. 25). Eilert reported the incident to two police officers, one from Shelby and one from Clarksdale; he described the car as a "Star Chief" with red and black or red and brown upholstery, and the license plate as containing a prefix and the digits 1769 (PR. 43). He described the driver to the police as an educated Negro, 5'10" tall, heavy set, short hair, and well dressed, wearing either dark grey or dark brown slacks (PR. 43; 49; 51). Eilert originally described the driver as wearing a grey sport coat, dark or cream brown slacks, a solid colored sport shirt and no tie (PR. 52; 159).

Charles Reynolds, the Clarksdale policeman then in Shelby, listened to Eilert's statement and concluded that Aaron Henry was the man (PR. 84). Reynolds testified that he knew petitioner in connection with his activities with the N.A.A.C.P. (PR. 78). Eilert confirmed that initially, Reynolds had assumed petitioner's guilt; he testified that the police officers "knew who I was talking about right away"; that "he was associated with N.A.A.C.P. or something" (PR. 159). Reynolds testified that he was familiar with petitioner's car and that he requested from the Clarksdale authorities identification of a vehicle bearing a license which included the digits reported by Eilert (PR. 72; 79; 74). Although the number was issued by 82 counties in Mississippi, each identified by a different prefix (PR. 69), the officers checked only Coahoma County, the county in which Clarksdale was located and in which petitioner lived (PR. 69). The officers supplied the prefix for Coahoma County and the partial number was matched with that of petitioner's car (PR. 74).

All of the foregoing activities, including a 20-mile drive from Clarksdale to Shelby through several towns, at a speed not exceeding 40-45 m.p.h. had transpired in approximately 25 minutes—between 5:30 to 5:56 p.m. (PR. 33-34; 88).

At 5:56 p.m. Reynolds received identification of the person to whom the license number was issued and at 6:04 p.m. he reported to Clarksdale authorities that a warrant had issued for petitioner's arrest (PR. 88-89). Eilert was then driven to the Clarksdale police station where he made another statement which was tape recorded by Coahoma County Prosecutor Pearson (PR. 44).

Shortly before 7:00 p.m., petitioner was awakened, arrested in his home and taken to the Clarksdale police station by the Chief of Police (PR. 94; 163). Petitioner was advised that his arrest was for "misconduct" in "Mound Bayou" (PR. 164), a town south of Shelby and south of the route taken by Eilert. Another warrant appeared in the County Court proceedings; the original was never produced, although demanded by the petitioner (PR. 56; 170-171).

At the police station, petitioner was exhibited to Eilert in a one-man lineup [PR. 45]. Petitioner was wearing dark trousers, a gold cardigan sweater and a white shirt, open at the collar. Eilert testified that these clothes were the same as those worn by the driver of the vehicle in which he was molested [PR. 49-51], thereby providing a third description of his assailant [PR. 43; 49].

Later that evening while petitioner was in custody, Police Chief Collins and the arresting officers returned to petitioner's house, obtain the keys to his car from his wife and entered and searched the car. Collins testified that the cigarette lighter was inoperable and that "dentyne" chewing gum wrappers were found in the ash try at the right hand side of the dashboard (PR. 98). At some point in the evening after Eilert had given a second statement, he "remembered" that the cigarette lighter in the car in question did not work and that the ashtray at the right end of the dashboard contained "dentyne" chewing gum wrappers (PR. 52-53). This information was rendered

after the search by Collins and his return to the police station [PR. 52-53]. In his statement, Eilert referred to gum wrappers but did not mention any brand name [PR. 86].

At the time of his arrest, petitioner gave a voluntary statement to the police consistent with his testimony at trial [PR. 95-96]. He is a pharmacist, has been since 1950, is married and has a daughter, then 11 years old [PR. 161]. On March 3, 1962, between 3 and 4:45 in the afternoon, he was working in his drugstore in Clarksdale. He proceeded to the Delta Burial Corporation office in Clarksdale and remained there talking to various persons until 5:30, at which time he went home [PR. 168]. He arrived at home within five or ten minutes, ate dinner and retired to rest before a meeting scheduled for 7:30 that evening. He was arrested shortly before seven [PR. 162-163].

Petitioner's presence in Clarksdale between 4:45 p.m. and 7:00 p.m. the time of his arrest, was established by six witnesses. Between 4:45 and 5:20 p.m. he was at the Delta funeral home engaged in conversation with four of those witnesses [PR. 114-118; 148-149]. He reached his home at approximately 5:30 p.m. and talked to two guests who confirmed his presence in his home at the time Eilert claims he was accosted. Additionally, both his wife and daughter were at home and his wife testified to his presence there. The witnesses described his apparel as navy or black trousers, a dress coat and a tie. Petitioner did not leave his home until the time of his arrest [PR. 119-120; 125-126; 129; 132-133].

Ministers and educators testified to petitioner's high moral character and petitioner testified, without contradiction, that he had normal domestic relations with his wife, a normal relationship with his daughter, and was without homosexual tendencies [PR. 135; 167; 174-180].

On Remand

Prior to commencement of the hearing on waiver, the State conceded and the court ruled that the burden of proof of a conscious waiver by petitioner or by his counsel was upon the State [R. 8-10]. From the five witnesses called by the State, the following facts were elicited: R. Jess Brown, one of petitioner's counsel, is a Mississippi attorney, having been admitted to the state bar in 1953 or 1954; after petitioner's arrest, Brown came to Clarksdale to arrange for bond and to investigate the case [R. 15]. Petitioner's counsel present at the first trial were Robert L. Carter, R. Jess Brown and Jawn Sandifer [R. 23-24]. Mr. Brown has had considerable experience in criminal matters and to the best of his knowledge, Robert Carter had practiced law in New York for at least 20 years; Mr. Brown had no knowledge of Mr. Sandifer's age and experience, but observed him to be a mature person [R. 23; 26; 28].

Although Robert Carter was present in the courtroom during the hearing on waiver, counsel for the State made no attempt to call him as a witness. The State attempted to offer as its first witness petitioner, but objection to his testimony was sustained by the court [R. 11-12].

At the Justice of the Peace hearing and at the first trial, both of which were attended by R. Jess Brown and Robert Carter, Ben Collins, the witness whose evidence is in question, and William Singletary [5] appeared. Collins testified at both levels, Singletary only at the county court trial [R. 35; 37; 45; 49]. Frank Wynn, who participated in the first trial as counsel for the State, testified that during Ben Collins' testimony about the search of petitioner's automobile, Wynn observed John Sandifer attempt to rise, and to be motioned down by Robert Carter [R. 37-38]. Similarly, Collins testified that during his description of the

[5] At the prior trial, Singletary testified for the defense with respect to the condition of the cigarette lighter in petitioner's car.

search of petitioner's car at the county court trial, Collins observed one of petitioner's counsel rise, and to be pulled back into his seat by another attorney at counsel table, after which the two engaged in a whispered conversation [R. 48-49].

The subpoenas issued prior to trial were offered and accepted as exhibits, and the Bolivar County Circuit Clerk and her deputy named all witnesses summoned by petitioner and stated that William Singletary was among the 27 witnesses summoned at the request of one of petitioner's attorneys [R. 62].

Petitioner moved for a verdict of no waiver upon which question the court reserved decision. Petitioner then stated that he would offer no evidence but would rest on the record [R. 63-64].

3. Procedure Below: Preservation of Federal Questions Original Trial

Prior to trial petitioner moved to quash the affidavit or alternatively for dismissal, on the ground that the affidavit was defective, not properly executed on personal knowledge and that the court was without jurisdiction [PR. 8-9]. Petitioner also moved for issuance of subpoenas *duces tecum* requiring production of the school records of the complaining witness, the auto registration records of Coahoma County for the year 1961-1962 and all original papers in the cause [PR. 4-5; 66]. All motions were denied [PR. 6, 9-10; 66]. The court ruled that exceptions were unnecessary [PR. 67].

After testimony concerning a prior affidavit, petitioner moved to have that affidavit produced. The County Attorney stated he did not have it and did not know where it was, whereupon petitioner again moved for dismissal urging that the court was bound by the record from the court below and that both the Justice of the Peace Court, that trial court lacked jurisdiction, and that petitioner was being deprived of due process of law [R. 82-85]. That

motion was denied and the same objections were made a part of a motion for directed verdict and a motion for new trial [PR. 112-113; 190-192]. All motions were overruled [PR. 113; 191-92].

At the termination of the State's case, petitioner moved for a directed verdict, urging, *inter alia,* commission of an illegal search and seizure, a violation of petitioner's rights under the Fourteenth Amendment and failure to prove the case beyond a reasonable doubt [PR. 112-113]. This motion was denied.

At the close of petitioner's case, his initial attempt to renew his motion for dismissal was overruled before it could be stated [PR. 227]; when stated it was overruled [PR. 182].

After entry of judgment of conviction, petitioner moved to set aside the verdict or for a new trial charging failure to direct a verdict at the end of the State's case, failure to direct a verdict at the end of petitioner's case, that the verdict of the jury was against the overwhelming weight of evidence, that the conviction of petitioner was a denial of rights secured by the due process clause of the Fourteenth Amendment and that the conviction deprived petitioner of his liberty and property without due process of law, denied him equal protection of the laws and abridged his privileges and immunities as a citizen, all in violation of the Fourteenth Amendment to the United States Constitution and Section 14 of the Mississippi Constitution. The motion for new trial was overruled [PR. 190-192].

Assignments of Error were filed in the Circuit Court and Supreme Court of Mississippi preserving all objections raised below. Only the Assignment of Error filed in the Mississippi Supreme Court appears in the printed record [PR. 199].

The Supreme Court of Mississippi did not, in either of its first two opinions, rule on federal questions pre-

sented; the rulings relied upon the Constitution of the State of Mississippi.

On Remand

The County Court of Bolivar County, found that there was no credible evidence to support a finding of waiver by petitioner and that the State had failed to sustain its burden of proof that conscious waiver was made by counsel; the opinion was not published. The fact of the decision was concluded from the order of the court below requesting briefs [R. 85-A]. In its response to that order, petitioner objected to the jurisdiction of the court to reverse facts found by the lower court and to the unique procedure resorted to by that court to assert jurisdiction to review [R. 138; 170]. The question of petitioner's costs of the prior appeal, previously moved before the court below and "continued and suspended pending the determination" by the County Court (23a) was included [R. 105].[6] All questions and objections raised prior to the first appeal of this case were preserved in the briefs and suggestions of error filed below. These included conviction of petitioner based upon unlawfully secured evidence and lack of jurisdiction, the affidavit required for jurisdiction in the Justice of the Peace being absent [R. 159-160; 171]. Redetermination of facts and reversal of the findings of the County Court as to waiver were challenged as violative of petitioner's Fourteenth Amendment rights to due process and equal protection of the laws; as having placed him twice in jeopardy in violation of the Fifth and Fourteenth Amendments [R. 138; 171-172] and, as constituting an arbitrary decision, rendered by way of a novel and retroactively applied procedure to render forfeit petitioner's constitutional rights [R. 159-160; 171-172]. The procedure resorted to by the court below was challenged

[6] To date the court below has declined to award costs as required by this Court's mandate of March 2, 1965 [R. 160].

as attenuated and an abuse of criminal and judicial process. and as a punitive measure in violation of petitioner's rights to due process and equal protection of the law under the Fourteenth Amendment [R. 170-172; 176-177]. The question of petitioner's right to be free from the use of unconstitutionally secured evidence, consistent with protection of the Fourteenth Amendment was preserved in the suggestions of error [R. 170-173].

The final opinion of the court below reinstated its former opinion (154 So. 2d 289) and affirmed the initial judgment of conviction of petitioner. The preliminary opinion of April 20, 1967, which the court below certified to this Court held that petitioner and his attorneys knowingly and consciously waived objection to the unlawful evidence, as to his rights under the Mississippi and United States Constitutions [4a].

REASONS FOR ALLOWANCE OF WRIT

I.

A criminal conviction, which rests upon evidence, judicially determined to have been obtained in violation of petitioner's constitutional rights and to be the sole support of that conviction offends the Due Process Clause of the Fourteenth Amendment and is in conflict with principles announced by this Court.

The judgment below reinstating the conviction of petitioner compounds the original error of the Supreme Court of Mississippi; the decision sustains a criminal conviction the validity of which depends upon evidence obtained in violation of petitioner's constitutional rights and is in conflict with the *ratio descedendi of Brown* v. *Mississippi*, 297 U.S. 278; *Mapp* v. *Ohio*, 367 U.S. 643; and *Malloy* v. *Hogan*, 378 U.S. 1.

In *Boyd* v. *United States*, 116 U.S. 616, this Court recognized that the protection from unreasonable search and seizure guaranteed by the Fourth Amendment was a concommitant of the right to freedom from compulsory self-incrimination afforded by the Fifth Amendment. The rights implicit in these two Amendments are interdependent and a part of basic due process of law articulated in the Fourteenth Amendment. *Weeks* v. *United States*, 232 U.S. 383; *Wolf* v. *Colorado*, 338 U.S. 25; *Mapp* v. *Ohio*, *supra*; and *Malloy* v. *Hogan*, *supra*. Protection from unlawful intrusion and appropriation of property by police officers and the subsequent utilization of that property to secure a criminal conviction is alien to the concepts of liberty embodied in the Constitution; to permit a state to obtain a conviction by such means is to acquiesce in attenuated due process. *Elkins* v. *United States*, 364 U.S. 206; *Agnello* v. *United States*, 275 U.S. 106.

The preservation of basic constitutional rights rises above rules of procedure which may not obscure the requisites of a fair and impartial trial. *Brown* v. *Mississippi*, *supra*. Absence of an objection to the admission of a coerced confession in *Brown* v. *Mississippi* did not free the trial court of the obligation to protect constitutional rights and to accord due process by excluding improperly obtained evidence, particularly where the fact of unlawful acquisition was evident and obvious. This obligation inheres and precludes a conviction lacking lawful evidence for its support.

The constitutional violation was sufficiently called to the attention of the trial court and was acknowledged by the court below. Both courts acknowledged that the tainted evidence was crucial to the validity of the charges against petitioner, the trial court, in its charge to the jury. In these circumstances, an appellate court may not, with impunity, sanction judicial abdication from the obligation

to protect fundamental constitutional rights. *Amos* v. *United States,* 255 U.S. 313.

2. The judgment of the court below does not rest upon sufficient state grounds to bar review by this Court. The error here involved is a denial of rights guaranteed by the Fifth and Fourteenth Amendments, accordingly, the manner of disposition of the constitutional issue is a federal question. *Fahey* v. *Connecticut,* 375 U.S. 85; *Chapman* v. *California,* 386 U.S. 987.

The purpose of the contemporaneous objection rule imposed by the court below, to insure orderly court procedure and to prevent delay in disposition of cases has not been frustrated by petitioner's motion. The three recent opinions of the court below (1a; 4a; 24a) do not reflect any new reasons for exaction of the forfeiture of petitioner's constitutional rights for what is declared to be a procedural default.

In the original opinion of the lower court exonerating defendant, and withdrawn subsequent to the state's suggestion of error, the court referred to an "unusual burden upon the trial judges to determine how to eliminate objectionable testimony when no objection is made, and at the same time insure a fair trial by due process of law." (55a). After remand by this Court, the court below rendered an opinion ". . . in an effort to find a procedural method whereby the state constitutional questions and the federal constitutional questions may be brought to the attention of the trial judge and . . . be effectively preserved" (28a) and provided that an objection upon constitutional grounds proffered during trial and before a defendant has offered evidence, would be timely. Waiver results only from a failure to object until after introduction of all of the evidence for the state and defense.[7] The recent decisions

[7] This provision was called to the attention of the trial court which refused to hold it binding for the purposes of the hearing on remand.

draw a distinction between objection or motion to exclude and a motion for directed verdict, which it describes as mere "argument to the court." The interest of the State sought to be served by the rule has been satisfied since in addition to sustaining or overruling the motion, "the trial judge could have stricken the evidence and advised the jury verbally not to consider the evidence introduced." (9a). (24a)

The motion for directed verdict offered both after the State's case and after the case for the defense directed the attention of the trial court to the tainted evidence and offered an opportunity to eliminate it. The summary, adverse disposition of all of petitioner's objections is persuasive that the manner in which objection was made would not have altered the disposition of the case.[8]

The court below has acknowledged that the evidence prevented petitioner from obtaining a fair trial. Rules of practice must not prevail over constitutional rights for technical reasons, particularly where there is no disservice to the legitimate interests of the State. *Gouled* v. *United States,* 225 U.S. 298. Invocation of an "arid ritual of meaningless form" must not be allowed to frustrate an attempt to secure determination of petitioner's constitutional rights. *Staub* v. *Baxley,* 355 U.S. 313; *Wright* v. *Georgia,* 373 U.S. 284.

The fact that the court below found it necessary to clarify state procedure is persuasive that the contemporaneous objection rule there articulated is an alternative rule of procedure to that whereby the court below has sustained clear error predicated on a tardy objection or motion. *Brooks* v. *State,* 209 Miss. 150, 46 So. 2d 94; *Carter* v. *State,* 198 Miss. 523, 21 So. 2d 404; *Fisher* v.

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[8] The trial court judge refused to instruct the jury that "If you find that the evidence used by the State was illegally obtained, you must acquit the defendant" [PR. 188].

State, 145 Miss. 116, 110 So. 361; and *Jenkins* v. *State,* 207 Miss. 281, 42 So. 2d 198. Where a state court retains and exercises discretion whereby error may be predicated upon constitutional questions raised at late stages in proceedings, the merits of the issue raised should be considered and determined. *Williams* v. *Georgia,* 349 U.S. 375. A conviction, solely supported by unlawfully acquired evidence represents an abridgement of fundamental rights and a constitutional violation which requires review by this Court.

3. Review and reversal of the county court's determination of no waiver and substitution of a judgment that petitioner had forfeited his federal rights was accomplished by a procedure inconsistent with settled state law. The procedure employed makes applicable the rules of *Davis* v. *Wechsler,* 263 U.S. 22 and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 682. See also *Rogers* v. *Alabama,* 192 U.S. 266; *Urie* v. *Thompson,* 337 U.S. 163; *Lawrence* v. *State Tax Commission of Mississippi,* 286 U.S. 276; *Broad River Power Company ex rel. Daniel,* 281 U.S. 537; *New York Central* v. *New York and Penn. Co.,* 271 U.S. 124; *Ward* v. *Love County,* 253 U.S. 17.

The county court found that there was no credible evidence to support a finding "that petitioner had waived his rights to object", and that the State "had failed to establish beyond a reasonable doubt or by a preponderance of the evidence", that conscious waiver was made by his attorneys (22a). The State filed no appeal from that judgment. The court below acquired the record, reviewed the county court's decision, and reversed it. The procedure was justified by the conclusion that the county court acted as an "agent or facility" for the court below (10a). Section 1960, Miss. Code Ann., upon which the court relies, provides:

> The Supreme Court may try and determine all issues of fact which may arise out of any appeal before it and be necessary to the disposition thereof,

> and, to this end, may, by order in each case, prescribe in what way evidence may be produced before it on the issue.

This provision relates to an *appeal* before that court. Fact-finding or reversal of facts is not the function of the appellate court. *Booker* v. *State*, 61 Miss. 16. Remand of a case terminates appellate jurisdiction and jurisdiction must be reacquired for review. The scope of review is described by the court below in *Allan* v. *Thompson*, 158 So. 2d 503:

> It is the uniform rule that the chancellor's finding on the facts is reviewable on appeal only when manifestly wrong, and when two or more reasonable inferences and deducible from the facts, the inference drawn and adopted by the chancellor will control on appeal. This rule has its foundation not only in the imperative operation of the constitutional ordinances mentioned; it has a further control and reason in this: the opportunities afforded to the trial court are far better for arriving at correct conclusions and findings from all of the questions of fact. Of this matter our Supreme Court has said: "Here we have nothing but the naked record before us; there, in most cases, the parties themselves are in the presence of the court and testifying. The manner of testifying, and their appearance upon the witness stand, and many other things, are influential in determining the triers of fact;" or as said in another case: "The decision of the chancellor where the evidence is conflicting will not be disturbed on appeal, since he is better able to determine the truth of the matter than the appellate court. And, this rule still holds true, although incompetent evidence has been admitted, if nevertheless there is enough competent evidence to sustain the decree.

The agency thesis evinced by the court is contrary to its previous determinations:

> The county court judicially adjudicates questions and its powers are fixed by law and it cannot be

> made the agent, of the Supreme Court or of any other tribunal . . . The only method known to our procedure to re-invest jurisdiction in the county court is by reversal and remand thereto by this Court, and the filing in the county court of mandate from this Court. Sec. 1990, Code 1942; *White* v. *State*, 190 Miss. 585, 195 So. 479. Divided jurisdiction, in such cases, is unknown to our procedure. We have no power to temporarily suspend our jurisdiction and re-invest the county court with jurisdiction to adjudicate issues; report back to this Court the result, thereby re-investing this Court with jurisdiction. The functions, powers and jurisdiction of the county courts are prescribed and conferred by the Legislature. This Court has no power to enlarge upon them . . . The county court cannot be made the agent of this Court. It judicially adjudicates questions. Its powers are fixed by the law. It is not, and in the nature of the case cannot be, the agent of any other tribunal. Masters make reports and such reports are subject to contest, rejection, modification, or confirmation. No such procedure could be adopted under the action here suggested. *Roberson* v. *Quave*, 211 Miss. 398, 51 So. 2d 777.

Section 1153 Miss. Code Ann. which delineates circumstances in which the state may appeal in a criminal case, provides that decisions adverse to the state may be appealed on questions of law, not on questions of fact, and that appeal shall not subject a defendant to further prosecution. *State* v. *Willingham*, 86 Miss. 203, 38 So. 334 and *Gulfport* v. *Stratakos*, 90 Miss. 489, 43 So. 812, held that where a lower court has found insufficient evidence to sustain the burden of proof, the State Supreme Court may not entertain appeals on questions of fact. In *State* v. *Johnson*, 166 Miss. 591, 148 So. 389, the court below held that despite its disagreement with a lower court's ruling on excluded evidence, it could not reverse the judgment. *State* v. *Brooks*, 102 Miss. 661, 59 So. 860; *Jackson* v. *Harland*, 122 Miss. 41, 72 So. 850; *State* v. *Adams*, 123 Miss. 514, 86 So. 337 are cognate cases.

The rule limiting appeals to questions of law in criminal cases avoids the constitutional injunction against placing an accused twice in jeopardy. Redetermination of the waiver question previously adjudicated by the county court in favor of petitioner, violates his rights to due process of law guaranteed by the Fourteenth Amendment. Corroborative evidence of the offense for which petitioner was convicted is required for submission of the case to the jury [PR. 187] (56a). The only corroborative evidence is that which was unlawfully secured. Absent the tainted evidence, the prosecution should be dismissed. *Lewis* v. *State*, 198 Miss. 767, 23 So. 2d 401; *Adams* v. *State*, 30 So. 2d 593 (Miss.); *Smith* v. *State*, 205 Miss. 170, 38 So. 2d 698.

By adopting and retroactively applying a new method for review, inconsistent with the former practice and decisional law of the state, the court below has, in effect, placed petitioner twice in jeopardy. It is submitted that the court of action followed by the court below has resulted in fundamental unfairness to petitioner sufficient to warrant dismissal of this prosecution. *Green* v. *United States*, 355 U.S. 184; *Hoag* v. *New Jersey*, 366 U.S. 464; and *Ciucci* v. *Illinois*, 355 U.S. 571, 573.

4. Assuming, *arguendo*, redetermination of facts by the court below is not, alone, sufficient to warrant review and reversal by this Court, the evaluation of those facts must be consistent with requirements of the federal Constitution. "The question of waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1. Establishment of waiver requires an intentional relinquishment or abandonment of a known right or privilege.

Waiver of constitutional rights is not lightly inferred. *Hodges* v. *Easton*, 106 U. S. 408, 412; *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Smith* v. *United States*, 337 U.S. 137, 150; *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 395; *Ohio*

Bell Tel. Co. v. *Commission*, 301 U.S. 292, 306. Courts will indulge every reasonable presumption against such a waiver. *Emspak* v. *United States*, 349 U.S. 190; *Smith* v. *United States, supra; Johnson* v. *Zerbst, supra.*

The court below rests its re-evaluation of facts relating to the question of waiver upon "a view of the case in total perspective" and consideration of the "facts and circumstances of the original trial . . . along with the evidence adduced at the hearing on . . . waiver" (12a). The facts presented at the evidentiary hearing are set out in detail in the *Evidence Presented: On Remand* section of the *Statement, supra,* p .

The evidence adduced at the hearing paralleled, but did not supplement, that previously offered and noted by this Court as furnishing an insufficient basis for a determination of waiver.[9] There was related again the activity of counsel at the defense table, the presence and use of the mechanic as a defense witness and the fact that counsel were not inexperienced. Notwithstanding this circumstance, the court below found conscious waiver by deliberately bypassing an objection as a matter of strategy.

This determination was accomplished by a judicial reversal of the burden of proof and is based upon what did *not*, as opposed to what did, occur at the hearing on remand. The conclusion of deliberate waiver as trial strategy is explained by the court below:

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[9] This Court stated that the affidavit attached to the State's brief relating to one counsel rising and being pulled or motioned down by another, and the offer of the state to accept an affidavit were an insufficient basis upon which to find a waiver, but justified an evidentiary hearing (379 U.S. at 450). The evidence presented for the defense through the mechanic, Singletary relating to the interior of the car and determined by the court below as curing the error of admitting tainted testimony (154 So. 2d 289) (43a) was held by this Court to "scarcely support a finding of waiver" (379 U.S. at page 451, ft. nt. 7).

> The State produced all the evidence it had, and that evidence points clearly to a "waiver." All evidence to the contrary is within the sole possession of defendant and his counsel. They have not been willing to reveal what really took place at defendant's end of the counsel table. They should not now be heard to say that there was no waiver. (13a)

Additionally, the concluding paragraph of the Separate Opinion states;

> I am therefore of the opinion that the defendant and his attorneys did not object to the tainted evidence during the original hearing, and that this failure was a deliberate bypass. I am fortified in this conclusion because of the efforts made by the attorneys for the defendant on the rehearing to prevent the court from determining whether or not the defendant intended to object to the tainted evidence. (18a)

The facts upon which the court below bases waiver are again the conduct of counsel at the defense table during Collins' testimony and the use of Singletary as a defense witness. The reasons for that decision are articulated: one of petitioner's counsel present at the trial who was called as a witness and did testify was restricted to matters "extrinsic of the record" (9a) (a restriction consistent with this Court's opinion (379 U.S. at 452)); objections were made to any communications between petitioner and the witness upon the ground of the attorney-client privilege (the court fails to recite that the objections were overruled [R. 14-15; 17; 20]) and the objection to petitioner's testifying for the State.

The initial determination of the county court at the evidentiary hearing and a point conceded by the State was that the burden of establishing waiver rested upon the State. Mississippi practice rules do not confine cross-examination to the scope of direct examination; accordingly, objection was made and sustained to the attempt of the State to call petitioner as its first witness. In its

opinion rendered when the court below remanded this case for an evidentiary hearing, no rules of procedure for that hearing were delineated (24a). Instead the court "clarified" its procedural rules. Petitioner's counsel urged the applicability of those rules before the county court which declined to apply them [R. 9] but decided to have a "broad" hearing as indicated by this Court [R. 10]. Of further significance is the fact that both R. Jess Brown and Robert L. Carter, petitioner's counsel, attended the evidentiary hearing. The presence of the latter was not availed of by the State; it chose not to call him to the witness stand dispite its specific request that he appear at the hearing.

The Supreme Court of Mississippi finds no error in the county court's decision not to apply the rules enumerated by the decision after remand. Disparate application of the rules violates petitioner's rights to equal protection of the laws required by the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Buchanan* v. *Warley*, 245 U.S. 60; *Brown* v. *Board of Education*, 347 U.S. 483; *Shelly* v. *Kraemer*, 334 U.S. 1; *Gayle* v. *Browder*, 352 U.S. 903.

The involvement and suggestion of strategy merits examination. There was no advantage to be advanced by a conscious omission to object. The tainted evidence was necessary to sustain the charges. Had timely objection been made, the trial court would have either sustained the objection or overruled it. Had the objection been sustained, the jury could not have validly considered the evidence; a verdict of guilty would have been in error and appealable. Alternatively, if the objection had been overruled, the situation would be precisely as it is now [10] except

[10] There is no necessity for contemplating conscious delay of objection in the hope of inviting error and laying a foundation for subsequent reversal (379 U.S. at 451), since the absence of corroborative testimony would, itself, require reversal, and that could be more expeditiously accomplished by a contemporaneous objection.

that potential impediments to review would be removed. Had strategy been involved, it would have dictated entering a contemporaneous objection.

The conclusion of the court below:

> It is apparent that the defendant and his attorneys would not—even at the hearing to determine whether or not they waived their objection—now claim that they did not know the procedural rule of Mississippi and that they did not waive their right to object to the evidence when it was introduced.

was reached by reversing the burden of proof placed upon the State and retroactively applying it to petitioner. *Ex post facto* imposition of new rules infringes upon petitioner's constitutional rights and denies him due process of law. *Manley* v. *Georgia*, 279 U.S. 1 (1921); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill, supra;* cf. *Armstrong* v. *Manzo*, 380 U.S. 545.

The decision below reflects the creation of a presumption of guilt based upon petitioner's exercise of his constitutional rights. The Supreme Court of Mississippi had ample opportunity to provide guidelines for conduct of the hearing on waiver. Having failed to do so, it has penalized petitioner for taking an adversary position in an adversary proceeding. Imposition of a penalty for the exercise of a constitutional right is a denial of due process of law in violation of the Fourteenth Amendment, *Douglas* v. *California*, 372 U.S. 359; *Griffin* v. *California*, 380 U.S. 612.

Since the decision that petitioner waived his federally protected rights is a question which must be determined consistent with standards relevant to the evaluation of constitutional rights, the decision of the court below requires independent examination by this Court and review to prevent a manifest miscarriage of justice. *Powell* v. *Alabama*, 287 U.S. 45; *Douglas* v. *California, supra; Draper* v. *Washington*, 372 U.S. 374; *Lynumn* v. *Illinois*, 372 U.S.

528; *Fahy* v. *Connecticut, supra; Aguilar* v. *Texas,* 378 U.S. 108; *Chapman* v. *California, supra; Chambers* v. *Florida,* 309 U.S. 227.

II.

Failure of the court below to award costs consistent with the mandate of this Court is a further denial of due process of law.

Following remand of the case, the lower court is required to consult the opinion and mandate of this Court in order to ascertain appropriate procedure. *West* v. *Breshear,* 14 Pet. 51, 54, 55; *Gaines* v. *Rugg,* 148 U.S. 228, 244. The mandate of this Court issued on March 2, 1965, granted petitioner recovery for costs of the former appeal to this Court in the amount of $1,367.99. Subsequently, on April 6, 1965, the State filed with this Court a motion to vacate the judgment taxing costs; that motion was denied on May 17, 1965. The decision denying that motion is final and should be dispositive of the issue.

Petitioner's motion addressed to the court below requesting that payment of costs be effectuated was continued and suspended pending determination of the waiver question (23a). In his response to the order of the court below prior to its decision reversing the county court and in the suggestions of error filed thereafter it was requested that the question of costs be determined. No decision has been rendered on the motion, although additional costs are now required for prosecution of the appeal at its present stage. Considering the circumstances of this case, it is submitted that the failure of the court below to award costs effects a denial of due process of law.

III.

Conviction by a court lacking jurisdiction is a fundamental denial of rights guaranteed by the Fourteenth Amendment, and conflicts with principles announced by this Court.

By reinstating petitioner's conviction, the Supreme Court of Mississippi has perpetuated the error of the original trial court which conducted proceedings to judgment and sentence despite its lack of jurisdiction. It is fundamental law, that the Due Process Clause of the Fourteenth Amendment requires a criminal trial by a court of competent jurisdiction. *Frank* v. *Mangum,* 237 U. S. 309, 326; *Devine* v. *Hand,* 287 F. 2d 687 (10th Cir. 1961); *Odell* v. *Hudspeth,* 189 F. 2d 300 (10th Cir. 1951); *Alexander* v. *Daugherty,* 286 F. 2d 645 (10th Cir. 1961).

Lack of an affidavit, the foundation of jurisdiction of the Justice of the Peace before whom petitioner was tried initially, rendered all subsequent proceedings void *ab initio.* Trial *de novo* in the County Court and the resulting judgment of conviction denied to petitioner that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The *sine qua non* of the Justice of the Peace's authority is set forth in Section 1832 of the Mississippi Code of 1942, Ann. which provides:

> Practice in criminal cases—On affidavit of the commission of any crime of which he has jurisdiction lodged with a justice of the peace, he shall issue a warrant for the arrest of any offender returnable forthwith or on a certain day to be named, and shall issue subpoenas for witnesses as in civil cases, and shall try and dispose of the case according to law; and, on conviction, shall order such punishment to be inflicted as the law provides.

Petitioner was arrested on March 3, 1962, for an offense allegedly committed on that same date. Certified to the County Court of Bolivar County as original papers constituting the record of proceedings before the Justice of the Peace, was an affidavit dated March 14, 1962, sworn to by the Bolivar County Prosecutor which was neither upon personal knowledge nor upon information and belief. That affidavit was certified as one of the original papers in this cause as required by Section 1205, Mississippi Code of 1942, Ann. [PR. 2-3; 53-54]. Although not attacked at the hearing before the Justice of the Peace, the affidavit imports jurisdiction and the law of Mississippi provides that defective jurisdiction properly may be raised at any point in the proceedings. See *Ivy* v. *State*, 106 So. 111; *Dorsey* v. *State*, 106 So. 827; *Pickle* v. *State*, 102 So. 4; *Sandifer* v. *State*, 101 So. 862; *Sullivan* v. *State*, 101 So. 683; *Slaton* v. *State*, 98 So. 838; *Norwood* v. *State*, 93 So. 354; *Quillen* v. *State*, 64 So. 736; *Cagle* v. *State*, 63 So. 672.

The State's contention that the affidavit certified to the County Court as a part of the record below was an amended affidavit is unsupported by any testimony. Moreover, the affidavit speaks for itself and does not reflect any amendment. Although the court below concerned itself with the liberality of amendments in Mississippi practice, the record is devoid of any competent testimony that such an amendment was, in fact, made. The determination that an amendment was made is based upon speculation; it is unsupported by the record [PR. 56; 63-64].[11]

Although existence of an original affidavit was attempted to be supplied by oral evidence [PR. 60-61], and conceding *arguendo*, that it may be so supplied, the trial court and the court below are, as set forth in the prior opinion of the Supreme Court of Mississippi, bound by the certified tran-

[11] Those statutory sections which were relied upon by the court below, specifically have reference to proceedings in the circuit courts and not before a Justice of the Peace.

script filed by the Justice of the Peace. The rule adopted by the court below, set forth in the prior opinion (154 So. 2d 289) [PR. 239] provides:

> . . . where properly authenticated or certified records have been filed on appeal, they import absolute verity, and the record is the sole, conclusive and unimpeachable evidence of the proceedings in the court below. If the record is incomplete or incorrect, amendment, or correction, must be sought by appropriate proceedings. The record cannot be impeached collaterally by oral testimony or extrinsic evidence *aliunde* the record. 4A C. J. S., Appeal and Error, Sec. 1143, p. 1201, *et seq.* See also, 31 Am. Jur., Justices of the Peace, Sec. 126, p. 285.

Thus the court below acknowledged this rule to be binding upon it. Consistent therewith, any alleged amendment of an affidavit certified as a part of the record must be reflected in that record and cannot be supplied by evidence *aliunde* that record. *Anthony* v. *Basset*, 172 Miss. 206, 159 So. 854.

Wittington v. *State*, 67 So. 2d 515, cited by the court below is consistent with the requirements of Section 1617 of the Mississippi Code of 1942, Ann. Rec. which provide that failure to question an improperly certified record of a Justice of the Peace in the county court constitutes waiver of that question. *Wittington* held that failure to object to the transcript of record below, during or before trial *de novo*, raised a conclusive presumption that the record was in compliance with the law. This ruling is binding on the State. The *Wittington* case is equally immaterial to the points raised herein and before the court below inasmuch as petitioner does not urge an "improperly certified" record.

Legal prosecution begins with an affidavit charging a crime. *Ratcliff* v. *State*, 26 So. 2d 69. Inclusion in the record of proceedings before the Justice of the Peace, of the affidavit of the Bolivar County Prosecutor executed on March 14, 1962, forecloses the issue of the filing of a pre-

vious affidavit sufficient to invoke the jurisdiction of the Justice of the Peace on March 3, 1962, the day of petitioner's arrest. That arrest is thereby rendered unconstitutional. *King* v. *Gokey*, 32 F. 2d 793 (N.D.N.Y. 1929); *United States* v. *Langsdale*, 115 F. Supp. 489 (W.D. Mo. 1953)[12] as are all subsequent proceedings based on the record. By virtue of the Justice of the Peace's lack of jurisdiction, none could be imparted to the County Court on appeal. *Smith* v. *State*, 24 So. 2d 85; *Powell* v. *State*, 17 So. 2d 524. The arrest of petitioner under these circumstances violated his rights under the Fourth and Fourteenth Amendment of the United States Constitution which requires that no warrant shall issue except upon probable cause supported by oath or affirmation.

This point was repeatedly urged before the County Court [PR. 8-9; 62-64; 113; 182], which further prejudiced petitioner's rights by declining to authorize issuance of a subpoena *duces tecum* directed to all original papers in the cause [PR. 66]. Failure to grant petitioner's motion for the subpoena successfully thwarted efforts which if successful, would have clarified those issues seized upon by the court below to support its decision. The absence of an affidavit executed on March 3, 1962, results in a jurisdictional defect, irreparable on the appeal to the County Court. *Smith* v. *State*, *supra*; *Powell* v. *State*, *supra*. Conviction, in the absence of a valid affidavit, is an unconstitutional denial of due process. *Bramlette* v. *State*, 8 So. 2d, 234; *Frank* v. *Mangum*, *supra*.

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[12] In *Giordenello* v. *United States*, 357 U. S. 480, this Court found that in the absence of an indictment reflecting the grand jury's finding of probable cause, which indictment is sufficient to validate issuance of an arrest warrant, "the issue of probable cause had to be determined by the Commissioner, and an adequate basis for such a finding had to appear on the face of the complaint."

IV.

Petitioner's conviction was produced by an abuse of process; the proceedings below lacked fundamental fairness in violation of the Fourteenth Amendment of the United States Constitution.

The arrest, investigation and trial of petitioner reflects a recurrent abbreviated procedure and substantive due process designed to procure swift conviction without token regard for the constitutional restraints imposed by the 14th Amendment. The description of the complainant's assailant was eagerly converted into a positive description of the petitioner by a local policeman who was familiar with petitioner, his automobile and his civil rights activities.

The proceedings in the trial court were permeated with indicia of prejudice. Motion for subpoenas were summarily denied; the court refused to desegregate the courtroom in accordance with petitioner's motion. Negro witnesses were addressed by their first name and extensive time and energy was expended on reducing to writing a previously acquired tape recorded statement taken from the complaining witness by the Coahoma county attorney who investigated a crime over which he had no jurisdiction. The atmosphere was hardly conducive to exclusive concentration on the trial of the cause. The circumstances subsequent to trial and the previous appeal of this case continue that pattern. The events which have resulted in reinstatement of the conviction of petitioner, the subject matter of this petition, are unique. It was assumed that initial determination of the question of waiver would resolve the issues in this case. Reversal of a fact question by the court below has contributed to the procedural quagmire which threatens to engulf this case.

At the time prosecution was initiated, petitioner's civil rights activities had become an anthema to the State. He

has been involved in litigation because of efforts to desegregate schools, to attempt to use segregated waiting rooms on a desegregated basis, for participating in selective buying campaigns in Clarksdale, the purpose of which was to secure equal employment for indigenous Negroes. The denial of the charges which gave rise to the prosecution resulted in libel suits commenced by Benford Collins, the Clarksdale Chief of Police and the Coahome County Prosecutor, both of whom alleged damage to their reputations. It was necessary to prosecute these cases to this Court where they were ultimately disposed of (*Collins* v. *Henry* and *Pearson* v. *Henry*, 380 U.S. 356).

The issue initially determined by the court below, that the conviction of petitioner occasioned by the admission of unlawfully acquired evidence denied him due process, should be dispositive of this case. Unfortunately, procedural and jurisdictional questions have resulted in its survival. Given the fact of inadequate legal evidence to support the charges against petitioner and the notoriety and quality of the charges filed against him, denial of review by this Court would effectuate manifest injustice. The importance of this case should not be measured by the fine or sentence imposed upon petitioner, but in the light of the atmosphere in which they arose and the subsequent history of the case.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that the issues here described require resolution and that the importance of the questions raised warrants granting of the petition for writ of certiorari.

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Certificate of Service

I, BARBARA A. MORRIS, counsel for petitioner, do hereby certify that I have this 6th day of February, 1968, mailed a copy of the foregoing Petition for Writ of Certiorari by United States air mail, postage prepaid, to Joe T. Patterson, Attorney General of the State of Mississippi and to G. Garland Lyell, Jr., Assistant Attorney General of the State of Mississippi, counsel of record for the State of Mississippi.

BARBARA A. MORRIS

APPENDIX A

Opinion of Supreme Court of Mississippi
July 10, 1967

RODGERS, Justice:

The Attorney General has filed a motion to reinstate the original conviction of the defendant, Aaron Henry, and we are of the opinion that this motion should be sustained.

This case has a long and somewhat unusual history. Aaron Henry was charged in a Justice of the Peace Court of Bolivar County, Mississippi, with having disturbed the peace. The case was appealed to the county court, and thence to the circuit court where the sentence of the county court was affirmed. It was then appealed to this Court, and upon original examination we determined that certain testimony was wrongfully admitted in evidence. On suggestion of error, however, this opinion was withdrawn and the suggestion of error sustained. *Henry* v. *Mississippi*, 154 So. 2d 289 (1963). The defendant appealed to the Supreme Court of the United States. *Henry* v. *State of Mississippi*, 379 U. S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965); 380 U. S. 926, 85 S. Ct. 878, 13 L. Ed. 813 (1965). The Supreme Court of the United States vacated the judgment of this Court and remanded the case to determine whether or not the defendant intentionally waived his objection to the introduction of the questioned evidence. A history of this case, up to that time, may be found in *Henry* v. *Mississippi*, 253 Miss. 263, 174 So. 2d 348 (1965). In that reported case, this Court directed that the trial court determine whether or not the defendant intentionally waived his right to object to the introduction of the questioned testimony. The trial court, after some delay, made its report to this Court, and from the testimony introduced in that trial, this Court determined that the defendant did, in fact, intentionally waive his right to object to the introduction of the illegally obtained evidence. We reported

this finding to the Supreme Court of the United States, as shown by the opinions in *Henry* v. *Mississippi*, 198 So. 2d 213 (1967). Thereafter, on June 12, 1967, the Supreme Court of the United States rendered the following opinion (not yet reported):

> "Respondent's motions that this Court reinstate the judgment of conviction and retax costs are denied. It is noted that the opinion of the Mississippi Supreme Court states: 'If this case were again before us, we would reaffirm our former opinion and judgment.' Further proceedings in the cause should be addressed to any new final judgment which may be entered by the Mississippi courts. Cf. *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 245-246; *Campbell* v. *United States*, 365 U. S. 85, 89."

We are now, therefore, of the opinion that our former opinion set forth in *Henry* v. *Mississippi*, 154 So. 2d 289 (1963), should be reinstated, and that the judgment of conviction of defendant, Aaron Henry, in the Circuit Court of Bolivar County, Mississippi, should be, and is, affirmed.

AFFIRMED

ALL JUSTICES CONCUR

Judgment—June 10, 1967

This cause this day came on to be heard on the motion of the Attorney General of the State of Mississippi to reinstate the original conviction entered at a former Term of Court and this Court having sufficiently examined and considered the same and being of the opinion that the said motion should be sustained doth order and adjudge that said motion be and the same is hereby sustained and the former judgment of the Circuit Court of the Second Judicial District of Bolivar County, Mississippi entered in this cause on the 20th day of November 1962-a conviction of disorderly conduct under Section 2089.5 of the Mississippi Code of 1942 Recompiled and a sentence to pay a fine of $250.00 and to serve 60 days in jail—be and the same is hereby reinstated. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant, Aaron Henry, and Dr. E. P. Burton and Rev. Isaac Daniel, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Opinion of Supreme Court of Mississippi
April 20, 1967

RODGERS, *Justice*:

In response to the request of the Supreme Court of the United States given to us in *Henry* v. *Mississippi*, 379 U.S. 443, 446, 85 Sup. Ct. 564, 13 L. Ed 2d 408 (1965), returned to this Court by an opinion in which the Supreme Court said: "We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence", we now make the following report.

A hearing has been held; a record has been made, and from the entire record of the proceedings in this case, we have reached the conclusion that the defendant, Aaron Henry, and his attorneys, did knowingly and consciously waive objection to the testimony obtained by the search of his automobile, with the permission of his wife, as to his rights under the Mississippi Constitution and the Constitution of the United States.

A brief review of the history and proceedings of the *Henry* case, which began as an ordinary misdemeanor proceeding in a justice of the peace court, but which has now become a national issue upon the question of state judicial proceedings, may be helpful in understanding the posture of the case as it now exists.

The defendant Henry was convicted in the Justice of the Peace Court of Bolivar County, Mississippi, upon a charge of disorderly conduct. The case was appealed to the county court, and tried de novo. The defendant was again convicted, and from this conviction, he appealed to the circuit court upon the record made in the county court. The circuit court affirmed the judgment of the county court, and defendant appealed to the Supreme Court of Mississippi.

In this Court, it was discovered that certain evidence against the defendant was obtained by an officer who was permitted to look into the locked automobile belonging to the defendant while it was at rest in his front yard, at a time when the officer did not have a search warrant and did not have permission of the defendant. We were of the opinion that this testimony was illegally obtained. At that time, Mississippi had a procedural rule requiring that one who desired to object to the introduction of illegally obtained testimony must do so at the time when the tainted testimony was offered in evidence. We did not find in the record that the defendant or his attorneys offered any objection to this testimony, during or after the trial, but we were of the opinion that his attorneys were out-of-the-state lawyers who did not know procedural requirements in the trial of cases in this State; therefore, in an effort to give the defendant a full and fair hearing, we entered an opinion reversing the case for a new trial. On Suggestion of Error, however, it was determined that the defendant was not only represented by out-of-state lawyers but also by competent local attorneys. Moreover, the prosecution offered in its Suggestion of Error to dismiss the charge against the defendant, if the attorneys for the defendant would file an affidavit stating that they were unaware that they were required to object to the introduction of inadmissible evidence at the time it was offered. No such affidavit was filed, and being of the opinion that it was necessary in the prosecution of cases to have some sort of procedure by which cases could finally be determined, we withdrew the first opinion and entered an opinion and order affirming the conviction of the defendant. It was obvious to this Court at the time that in fact no objection was made to the testimony at any time during the trial, and therefore if the attorneys were aware that it was necessary to object to the testimony in the de-

fense of their client, they obviously, for some reason, did not want to make an objection to the introduction of the evidence during the trial, and thus could not be heard to object on appeal to this Court.

The record will reflect (and it is admitted) that neither the defendant nor his attorneys made any objection to the introduction of the tainted evidence at any time before or at the time the testimony was offered by the prosecution. Moreover, the defendant's attorneys cross-examined the witness fully on this evidence so as to bring out all matters with reference to the search of defendant's automobile. It was not until after the State had concluded its case that attorneys for the defendant indicated that they were in any respect unhappy with the evidence as to the search of the automobile, and then no motion was made to exclude the evidence, nor in any manner was objection made to its introduction. They only requested that the defendant be discharged and acquitted, because, they contended, the State had not made out its case. The attorney for the defendant made the following motion:

> "We're going to make a motion, your Honor, for a *directed verdict.* We are going to base our motion on several grounds. . . . Secondly, we contend that the warrant having been issued and the testimony of this Mr. Collins on the stand to the effect that after he had placed this man under arrest, he then proceeded to go and search his car, and clearly this is in violation of his rights under the *Fourth Amendment,* and it is unlawful search and seizure so the evidence that they have secured against this defendant is illegal and unlawful." (Emphasis supplied.)

It was obvious to us that the foregoing motion was not a motion to exclude the evidence, but rather was an argument to the court that the evidence as a whole in the case

did not make out a case against the defendant, assuming the evidence was inadmissible. It is simply a motion for a directed verdict.

When the testimony for the State and for the defendant had been concluded, one of the attorneys for the defendant again made a motion. He said:

> "Your Honor, at this time at the close of the case we want to make a motion for a *directed verdict.* We base it on the grounds and the reasons which we set forth in our motion for a *directed verdict* at the close of the State's case. We make it now at the close of the entire case on those grounds and on the grounds that the evidence has not shown beyond any reasonable doubt under the law that the defendant is guilty of the charge. We therefore make a motion for a directed verdict at this time." (Emphasis supplied.)

Here again, it will be noted that the defendant's attorneys made no motion to exclude the testimony with reference to the search of defendant's automobile, nor did he request that the court exclude the evidence and direct the jury that the evidence had been excluded. He simply made a motion for a directed verdict of acquittal. The trial court had two alternatives. The judge could have sustained the motion and discharged the defendant, or he could have overruled it. He overruled the motion.

After the jury had returned the verdict, the defendant made a motion for a new trial. The attorneys sought a new trial upon the ground, among others, that "(T)he court erred in overruling defendant's motion for a *directed verdict* after the State had rested its case." (Emphasis supplied.) Here again, there is no motion or suggestion that the court should have excluded the evidence with reference to the search of defendant's automobile, but rather, that the

trial court should have *directed a verdict* in favor of the defendant. There was no objection to the evidence complained of by the defendant or motion to exclude it from the consideration of the jury at any place in the record during the trial or at any other time.

The Supreme Court of the United States, in its opinion in the *Henry* case, however, said:

> "But on the record before us it appears that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony or have taken other appropriate corrective action. For example, if there was sufficient competent evidence without this testimony to go to the jury, the motion for a directed verdict might have been denied, and the case submitted to the jury with *a properly worded appropriate cautionary instruction.*" 379 U. S. at 448. (Emphasis supplied.)

The trial court obviously thought that there was sufficient evidence to go to the jury and to affirm the verdict. We certainly thought there was sufficient evidence to sustain a jury conviction. A trial judge in Mississippi cannot instruct the jury on any subject except at the request, in writing, of the parties. The pertinent part of Mississippi Code Annotated section 1530 (1956) is as follows:

> "The judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case."

If the trial judge were to interpose an objection to evidence on behalf of the defendant in criminal cases, he would often severely interfere with the defendant's counsel in his effort to develop trial strategy and would possibly do defendant more harm than good. We pointed out in *Henry* v. *State,* 253 Miss. 263, 285, 174 So. 2d 348, 350 (1965): "However, the trial judge could have stricken the evidence and advised the jury verbally not to consider the evidence introduced." The defendant did not ask the court to exclude the evidence, and apparently did not want it stricken. What he wanted was to be acquitted because the evidence was introduced without his objection.

When this case came back to this Court from the United States Supreme Court, we established a new rule of procedure. *Henry* v. *State, supra.* This rule is similar to the federal rule in which the defendant is permitted to petition the court to strike out illegal evidence before the trial, or to object at the time the evidence is introduced. We then directed the trial court to have a hearing as to whether or not Aaron Henry intentionally waived his right to object to the search of his automobile.

The trial judge who heard the original case recused himself and another trial judge was called in to hear the evidence as to the limited issue presented by the United States Supreme Court.

Without detailing the testimony, the evidence showed that at the time the officer was testifying with reference to the search of the automobile, an attorney for defendant stood up and another attorney for defendant pulled him down and whispered to him. No objection was made. It will be recalled that during the original trial, the young prosecuting witness, testifying in answer to the question "Did you have an occasion to know anything else that might—peculiarity about this automobile while in it?" said "Yes, Sir. I asked him if he minded if I smoke and he said 'no'. I didn't have any matches, so I went to push

the cigarette lighter in and it didn't work and so I didn't have a light so I didn't smoke." Thereafter a certain witness by the name of Willie Singletary, Jr. was introduced by the defendant to show that he had repaired the cigarette lighter in the Henry automobile, but on redirect examination it developed that the cigarette lighter had been replaced on March 3rd. It was after this witness testified that the defendant's attorneys became unhappy with the evidence as to the search of defendant's automobile.

At the hearing, on the question as to whether or not there was a waiver by the defendant or his attorneys, the State called one of the defense attorneys who was present at the original trial, but the trial court restricted his evidence to matters "extrinsic of the record." Objection was made to any communication between the defendant and the witness, upon the ground that it was confidential communication between a client and his attorney. The State attempted to recall Aaron Henry as a witness but his attorneys objected upon the ground that it might tend to incriminate him. The State then offered to show the questions the prosecution would have asked defendant had he been permitted to take the witness stand. It is apparent that the defendant and his attorneys would not—even at the hearing to determine whether or not they waived their objection—now claim that they did not know the procedural rule of Mississippi and that they did not waive their right to object to the evidence when it was introduced.

The trial judge was of the opinion that the State did not meet the burden of showing that the defendant waived his objection to the evidence, but we do not agree with this determination. The trial judge, in this instance, acted as a facility or agent for this Court for the purpose of developing the evidence, as we are permitted to do by Mississippi Code Annotated section 1960 (1956). The burden is upon this Court to determine whether or not we are satisfied

that the defendant or his attorneys deliberately waived defendant's right to object to the testimony with reference to the search of his automobile. Neither the defendant nor his attorneys asked the court to strike the evidence. No objection has ever been made to this evidence. The defendant simply wanted to be released because his attorneys knowingly permitted the evidence to be introduced without objection.

In the *Henry* case, the Supreme Court of the United States suggested that the actions of defendant's counsel was a strategic move, and stated that if that were true, it would be binding on defendant. The Court said:

> "The evidence suggests reasons for a strategic move. Both the complaining witness and the police officer testified that the cigarette lighter in the car did not work. After denial of its motion for a directed verdict the defense called a mechanic who had repaired the cigarette lighter. The defense might have planned to allow the complaining witness and the officer to testify that the cigarette lighter did not work, and then, if the motion for directed verdict were not granted, to discredit both witnesses by showing that it did work, thereby persuading the jury to acquit. Or, by delaying objection to the evidence, the defense might have hoped to invite error and lay the foundation for a subsequent reversal. If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circum-

> stances are exceptional, preclude the accused from asserting constitutional claims, see Whitus v. Balkcom, 333 F. 2d 496 (CA 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case." 379 U. S. 451, 452, 85 Sup. Ct. 569, 13 L. Ed. 2d 414, 415 (1965).

Our findings that counsel deliberately waived the right to object to the illegal evidence is based on a view of the case in total perspective. The facts and circumstances of the original trial must be considered along with the evidence adduced at the hearing on the determination of whether there was a waiver. In summary, when the illegal evidence was offered during the original trial, there was no objection, and, as already stated, counsel for defendant did not give the trial court an opportunity to rule out the evidence which was found by the officers in the search of defendant's automobile. Counsel for defendant, in effect, asked the trial court to enter a directed verdict and thus acquit the defendant. Counsel had everything to gain and nothing to lose, for, if the directed verdict had followed his motion, the case would have ended; and if overruled, he would have the advantage of impeaching the officers concerning the condition of the cigarette lighter found in the search (which they attempted to do), and thus have an opportunity to persuade the jury to acquit. If the jury failed to acquit, counsel would have (if their present position is upheld) a foundation for reversal. Even on the motion for a new trial, following defendant's conviction, no mention was made of the evidence obtained by the search, although it could be contended the motion did so indirectly.

We find as a fact that the State met the burden of proving that defendant's counsel deliberately waived ob-

jection to the evidence as a strategic move. In the absence of any attempt whatever to rebut the compelling inference that the failure to object was deliberate, our finding is that there was a waiver. The State produced all the evidence it had, and that evidence points clearly to a "waiver." All evidence to the contrary is within the sole possession of defendant and his counsel. They have not been willing to reveal what really took place at defendant's end of the counsel table. They should not now be heard to say that there was no waiver.

We therefore report to the Supreme Court of the United States that we are of the opinion, and so find, that the defendant, Henry, acting through his attorneys, deliberately intended to bypass any objection the defendant had to the searching of his automobile by the officer. If this case were again before us, we would reaffirm our former opinion and judgment.

ALL JUSTICES CONCUR.

Opinion of Supreme Court of Mississippi, April 20, 1967

RODGERS, Justice:

SEPARATE OPINION

I have heretofore written the opinions and the report to the Supreme Court of the United States in the *Henry* case, in the tenor and language suggested by the Supreme Court of Mississippi. I feel, however, that I should point out in a separate opinion some authorities which have influenced my thinking, and which I have submitted to the other Members of the Mississippi Supreme Court. I offer these authorities, not in an effort to advise the Supreme Court of the United States as to the law in the case, but rather to show the body of the law on which we based our determination that the defendant had, in fact, waived his right to object.

BEFORE HENRY V. UNITED STATES (1965)

Prior to the decision in the *Henry* case (*Henry* v. *Mississippi*, 379 U. S. 443, 85 Sup. Ct. 564, 13 L. ed. 2d 408-1965), the universal rule throughout the United States, in State and Federal Courts, was to the effect that the failure to object to evidence illegally seized was considered a waiver of the right to object. I cite here some of the cases from the various Federal Courts: *United States* v. *Lutz*, 142 F. 2d 985 (1944); *Skiskowski* v. *United States*, 158 F. 2d 177 (1946); *Sang Soon Sur* v. *United States*, 167 F. 2d 431 (1948); *Metcalf* v. *United States*, 195 F. 2d 213 (1952); *Eleazar* v. *United States*, 241 F. 2d 385 (1956); *Brennan* v. *United States*, 240 F. 2d 253 (1957); *United States* v. *Sheba Bracelets, Inc.*, 248 F. 2d 134 (1957); *O'Dell* v. *United States*, 251 F. 2d 704 (1958); *Moreland* v. *United States*, 270 F. 2d 887 (1959); *Sandoval* v. *United States*, 285 F. 2d 605 (1960); *Isaacs* v. *United States*, 301 F. 2d 706 (1962); *Westover* v. *United States*, 342 F. 2d 684 (1965); *Stanfield* v. *United States*, 350 F. 2d 518 (1965).

SINCE THE HENRY CASE

There are many interesting articles written by law professors, law editors, and students, upon the rule in the *Henry* case. A few of them are listed below: The Inadequate State Ground by Alfred Hill, Professor of Law, Columbia University, Columbia L. Rev., Vol. 65:943, No. 6 (June 1965); (This is a very comprehensive article.) The Supreme Court, 1964 Term, by Paul J. Mishkin, Professor of Law, University of Pennsylvania Law School, Constitutional Law, Adequate State Ground, Contemporaneous Objection Rule, Harvard L. Rev., Vol. 79:56, at p. 117. Federal Jurisdiction—Non-Federal Ground Rule, North Carolina L. Rev., Vol. 43, at p. 988, by Ronald W. Howell (1965). Federal Court Procedure, Texas L. Rev., Vol. 987 (1965), by Darryl M. Springs. Search and Seizure . . . Waiver (Supreme Court decisions), American Bar Association Journal, Vol. 51, at p. 375 (1965).

It is respectfully suggested that the rule in the *Henry* case is more stringent than the rule in the Federal Courts over which the Supreme Court of the United States has supervisory jurisdiction.

Rule 41 (e) of the Federal Rules of Criminal Procedure permits the defendant to make a motion for the return of illegally seized evidence prior to the trial, but it is said: "(T)he court in its discretion may entertain the motion at the trial or hearing" (p. 213). Note 104, Title 18, United States Code Annotated (1961) at page 273, cited under this Rule, sets out many cases wherein it is recognized that timely objection to evidence obtained by an unlawful search must be made by the defendant prior to the trial where he had ample opportunity to do so. There are many cases holding that the filing of a motion on the first day of the trial was untimely. See Supplementary Note 113 at page 111. *United States* v. *Nicholas*, 319 F. 2d 697, cert. den.

84 Sup. Ct. 337, 375 U. S. 933, 11 L ed. 2d 265 (U.S. Ct. App. 2nd Cir.), (N. Y. 1963).

In an effort to coordinate our procedure with that of the Federal Court on a method of securing to the defendant an adequate hearing as to the exclusion of tainted evidence, we adopted a rule similar to Rule 41 (e) of the Federal Rules of Procedure. *Henry* v. *State,* 174 So. 2d 348, 351 (Miss. 1965).

Many state courts across the Nation have reexamined their rules of procedure since the *Henry* case, and have retained the requirement that a contemporaneous objection be made to the tainted evidence.

In the case of *In Re Sterling,* 47 Cal. Rptr. 205, 208, 407 P. 2d 5, 8 (1965), Chief Justice Roger Traynor points out that California has adequate procedural rules to meet the requirement of *Townsend* v. *Sain,* 372 U. S. 293, 83 Sup. Ct. 745, 9 L. ed. 2d 770 (1963), and states: "'Failure to exercise these readily available remedies will ordinarily constitute such a deliberate bypassing of orderly state procedures as to justify denial of federal as well as state collateral relief."

In the case of *Nelson* v. *People of California,* 346 F. 2d 73 (1965), (32 Cal. Rptr. 675 — 1963), the United States Court of Appeals for the 9th Circuit delivered a comprehensive opinion analyzing, expanding and elucidating upon the rule in the *Henry* case. The Court pointed out in the *Nelson* case that although the search of the defendant's apartment was made without a search warrant, Nelson was represented by a Deputy Public Defender of Los Angeles County, and this counsel objected to the testimony on the ground that it was "immaterial." The objection was sustained and was not further explored. There was no objection made at any time during the trial to the effect that the evidence was obtained by an illegal search in violation of the defendant's constitutional rights. The

Court pointed out that unless the objection is raised in the trial court under the law of California, it cannot be raised on appeal. The defendant contended upon appeal that the trial court erred because it did not conduct an evidentiary hearing to determine whether or not the search was illegal. The appellate court pointed out that the Federal Court was required to make an independent investigation of constitutional issues of fact, and that the District Court had concluded that the defendant had deliberately bypassed the right to make an objection. The Court then analyzed *Henry* v. *Mississippi*, 379 U. S. 443, 85 Sup. Ct. 564, 13 L. ed. 2d 408 (1965), and compared it with *Fay* v. *Noia*, 372 U. S. 391, 83 Sup. Ct. 822, 9 L. ed. 2d 837 (1963), and concluded in *Nelson*:

> "We think that Henry limits Fay v. Noia at least to this extent—that it stand for the proposition that counsel's decision, although made 'without prior consultation with an accused,' to by-pass the contemporaneous-objection rule as part of trial strategy, will nevertheless 'preclude the accused from asserting constitutional claims.'" 346 F. 2d at 81.

Many state and federal cases have cited the *Henry* case and pointed out that under the same or similar facts and circumstances set out therein, the attorney for the defendant waived and bypassed the right to object to the evidence of an alleged violation of a known constituional right. See: *Commonwealth* v. *Myers*, 421 Pa. 61, 217 A. 2d 730 (1966), (failure to object to confession); *State* v. *Tahash*, 141 N. W. 2d 3 (1966), (Minn. 1965); *Commonwealth* v. *Kulik*, 420 Pa. 111, 216 A. 2d 73 (1966), (dissenting opinion); *Commonwealth* v. *Myers*, 418 Pa. 366, 211 A. 2d 481 (1965); *Commonwealth* v. *Maroney*, 417 Pa. 308, 207 A. 810 (1965), (failure to object to confession). In the case of *Hitchcock* v. *State*, 388 S. W. 2d 429, 430 (1965), (Texas Ct. of Crim.

App.), the Court said: "This Court has consistently held that in the absence of timely objection, complaint as to the receipt of evidence on the ground that it was illegally obtained is waived." See the many opinions written prior to the *Henry* case collected under 23A C. J. S. *Criminal Law* § 1060 b., Note 46 at page 8 (1961); 24 C. J. S. *Criminal Law* § 1678 (4) 1197 (1961); 53 Am. Jur. *Trial* 117 § 134 (Time of Objection) (1945).

I am therefore of the opinion that the defendant and his attorneys did not object to the tainted evidence during the original hearing, and that this failure was a deliberate bypass. I am fortified in this conclusion because of the efforts made by the attorneys for the defendant on the rehearing to prevent the court from determining whether or not the defendant intended to object to the tainted evidence. Moreover, the great weight of authority requires a contemporaneous objection to evidence sought to be excluded.

Judgment—April 17, 1967

After consideration of the record of the county court hearing to determine whether defendant knowingly and consciously waived his right to object to evidence discovered in the search of his automobile, and oral arguments of the attorneys and written briefs, the court finds that the defendant did knowingly and consciously waive his right to object to said evidence, and the clerk of this court is hereby ordered and directed to certify to the Supreme Court of the United States the record made on the hearing, the briefs of the parties, the opinions of this court, and this order.

ORDERED and ADJUDGED this April 20th, 1967.

APPENDIX B

Opinion of the County Court of Bolivar County January 5, 1967

This case arose out of Petitioner's conviction for Disturbing the Peace in Bolivar County, Mississippi, wherein improper corroborating evidence of the State's principal witness was admitted, without contemporaneous objection on the part of Petitioner. After two opinions by the State Supreme Court, the cast being unfavorable to Petitioner, the Supreme Court of the United States granted certiorari, 376 U.S. 904, 11 L. ed. 2d 604, 84 S. Ct. 657, and subsequently vacated said judgment of convictions and remanded the case for a hearing "on the question whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence". *Henry* v. *Mississippi*, 379 U.S. 433, 13 L. ed. 2d 408, 85 S. Ct. 564.

Hearing was had at Cleveland, Mississippi, pursuant to subsequent direction thereasto by the Supreme Court of Mississippi on October 10, 1966 before Arthur B. Clark, Jr., Circuit Judge of the Fourth Judicial District of Mississippi. The Judge of the County Court, W. D. Jones, who had heard the case originally, had recused himself and the Judge of the Circuit Court was agreeable to the State and Petitioner.

Both the State and the Petitioner being present and represented by counsel, there were first presented to the Court by Petitioner, motions as follows:

(1) That the hearing was violative of the rights of Petitioner under the Fourth and Fifth Amendments of the Constitution of the United States with particular reference to double jeopardy;

(2) That the hearing be restricted to the questions of whether or not the Defendant, Aaron Henry, consciously

waived his rights to the introduction of the testimony of Ben Collins with reference to the evidence obtained by the wrongful search of the Defendant's automobile on the ground that it violated the United States Constitution. R 2-6.

These motions were denied, R 10, and the hearing was directed to be had on the question of conscious waiver by the Defendant or his counsel in reference to the tainted evidence, with the burden of proof being on the State and the evidence restricted to that which would be extrinsic of the prior hearing, R 10.

The State attempted to call the Defendant, Aaron Henry, objection was made by counsel and sustained by the Court on the ground that such would be violative of his rights against self-incrimination under the Constitution of the United States and the State of Mississippi.

The State then called R. Jess Brown, an attorney of Defendant-Petitioner, who testified over objection as to various generalizations concerning the prior trial, other attorneys of the defendant-petitioner, his own general qualifications and experience. Brown was not permitted to testify as to any communication direct or indirect between himself and his client Henry, R 14-28.

The State thereupon introduced evidence that two of the defendant's counsel were present at both the preliminary hearing and the trial, that in substance the same tainted evidence was presented at both trials, R 29-49, that at the time of its introduction in the County Court trial, one of the defendant's attorneys stood up, that he was pulled down by another of defendant's attorneys and made no objection, and that a conversation ensued between counsel, R 39, R 48; that a mechanic Singletary was present in the trial before the Justice of the Peace as a defense witness, that he did not testify, that he was present as a defense witness in the County Court hearing, that he did testify; that his testimony is of record (this whole record

was offered by the State, but the Court felt that it was available, if necessary, and should not encumber this hearing by its introduction).

The State offered to introduce various questions which it would ask Aaron Henry, if permitted to do so. This was by the Court denied. No proof was offered by Henry, and his attorneys moved for a decision in his favor on the evidence presented. From the foregoing the Court finds the following:

(1) That there is no credible evidence to support the finding that Aaron Henry consciously waived his right to object to the evidence in question;

(2) That the State did not sustain the burden of proof by a preponderance of the evidence or beyond a reasonable doubt that conscious waiver was made by his attorneys.

What is the meaning of the objective action taken by defendant's attorneys in the courtroom at the time of the introduction of the evidence in question. The action was: an attorney stood up, said nothing, sat down after receiving a signal.

Assuming that the testimony of Singletary was known to the defense attorneys (this is undoubtedly true as he was present in both trials and testified in one for the defense), and assuming that they intended to use his testimony in contradicting the State's witnesses, it is pure speculation to conclude that the lawyers *knew* that the tainted testimony of the State's witnesses was inadmissible and that they consciously permitted highly relevant, extremely prejudicial evidence to be admitted, with the express purpose of contradicting it with their mechanic Singletary. If they didn't know or think the evidence was improper, how could they possibly waive it consciously? How can this Court know what these lawyers know or thought they knew at the time in question?

Opinion of the County Court of Bolivar County

A trial court is in an impossibly difficult position, as was the one which first heard this case, if it must, in order to protect the right of a defendant anticipate and properly decide constitutional issues before they are raised and cross-examine the defendant and his attorneys during the course of a trial as to trial tactics, and knowledge of the law. Trial courts, as others, must never forget the frailties of humanity, man's natural desire and inclination to protect himself from harm, whether it be a criminal conviction or a proved accusation of ignorance. Responsibility must lie with reference to objective action, not subjective unknown and unknowable attitudes.

The State could not and did not sustain the burden of proof imposed upon it, it proved no knowing waiver by petitioner or his counsel.

APPENDIX C

Opinion of Supreme Court of Mississippi April 19, 1965

RODGERS, Justice:

ON MOTION TO REMAND FOR HEARING AND MOTION TO REPAY ADVANCED COST

We have considered the motion of appellant Aaron Henry, requesting this Court to require the proper official of the State of Mississippi to refund to him costs alleged to have been incurred in the Supreme Court of the United States by order of a mandate dated March 2, 1965. The answer of the State of Mississippi to this motion has an attached copy of the motion filed by the Attorney General of Mississippi in the Supreme Court of the United States requesting that Court to vacate or modify its previous mandate.

We have also considered a motion filed by the Attorney General asking this Court to enter an order remanding the foregoing case to the County Court of the Second Judicial District of Bolivar County, Mississippi, for a hearing to determine whether or not there was a waiver of the right to object to the testimony of Clarksdale Chief of Police, Ben Collins, with reference to the search of appellant's automobile, in accordance with Rule 37B of the Mississippi Supreme Court.

An examination of the record in this case reveals that this Court determined (July 12, 1963, Miss. , 154 So. 2d 289) that the knowledge obtained by the witness Ben Collins with reference to the interior of appellant's automobile was obtained in violation of the Mississippi Constitution, and we also determined that defendant waived his right to object to the admission of such evidence by failing to object at the time it was offered in evidence. The judgment and sentence of the trial court was affirmed in this Court.

An appeal was taken from the judgment of this Court to the United States Supreme Court. On January 18, 1965, the opinion of the Supreme Court was rendered, wherein it was held that: "We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was *not* made to the admission of the illegally seized evidence." (Emphasis supplied.) *Henry* v. *State*, 85 S. Ct. 564, 566-67 (1965).

The opinion of the Supreme Court of the United States pointed out that it had no power to revise judgments on questions of state law but stated that: "These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." 85 S. Ct. at 567.

The opinion also points out that: "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest." *Ibid.* The Supreme Court was of the opinion, however, on the record in this case that: ". . . it appears that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony or have taken other appropriate corrective action. For example, if there was sufficient competent evidence without this testimony to go to the jury, the motion for a directed verdict might have been denied, and the case submitted to

the jury with a properly worded appropriate cautionary instruction." 85 S. Ct. at 568.

Inasmuch as the Mississippi Circuit Courts do not have the authority to grant instructions to the jury, except those requested in writing, the circuit judge could not have given the jury a well-worded cautionary instruction as suggested in the opinion, *supra*. Miss. Code Ann. § 1530 (1956). However, the trial judge could have stricken the evidence and advised the jury verbally not to consider the evidence introduced. This procedure is not in violation of the foregoing code section. *Welch* v. *Morgan*, 225 Miss. 154, 82 So. 2d 820 (1955). It is also true that the trial court could have sustained a motion to dismiss at any time; however, there must be some method of orderly procedure in the trial of cases. In the case of *Lewis* v. *State*, 155 Miss. 810, 125 So. 419 (1930), this Court pointed out at p. 421 that:

> "We need only to say as to this that it is the business of courts to adjudicate cases according to established and necessary general and practical rules of procedural as well as of substantive law. We have no dispensing power, and can assume none, to bend those essential rules to fit the exigencies of a particular case, else there would soon be no rules and no orderly enforcement of the law."

One who claims his constitutional rights have been violated, state or federal, and desires to object to such illegally obtained testimony being introduced before the jury must make his objection known to the trial court in such a manner and at such a time as to give the court an opportunity to sustain or overrule the objection before such illegal testimony has been given to the jury. The party claiming the right to object cannot wait until the testimony has been introduced, and also introduce the same testimony in his own right, and at the conclusion of the testimony expect the court to suppress such evidence and

dismiss the case on the constitutional ground that the evidence should have been excluded from the jury.

The rule in the Federal court as to the suppression of illegally obtained evidence is set out under Rule 41 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. at p. 212. There are many Federal cases cited under this rule in 18 U. S. C. A. holding that the right to object to evidence on the grounds of illegal search is waived unless there is a timely motion to suppress the evidence. A form for this motion may be found in the Appendix of Forms to the Federal Rules of Criminal Procedure.

The Supreme Court of the United States has said in the instant case that: "Only evidence extrinsic to the record before us can establish the fact of waiver, and the State should have an opportunity to establish that fact." The Court then pointed out that in cases from Federal Courts, the Supreme Court had vacated judgments on condition and remanded them for a hearing "suspending the determination of the validity of the conviction pending the outcome of the hearing. . . .

"By permitting the Mississippi courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations." 85 S. Ct. at 570.

Finally, the Court said: "It has been suggested that this friction (federal habeas corpus procedure) might be ameliorated if the States would look upon our decisions in *Fay* v. *Noia, supra,* (372 U. S. 391, 439) and *Townsend* v. *Sain, supra,* (372 U. S. 293, 312-319), as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of the Federal claims. . . . Therefore, the judgment is vacated and the case is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion." 85 S. Ct. at 570.

In an effort to comply with the suggestion of the Supreme Court of the United States in its opinion, *supra,*

and in an effort to find a procedural method whereby the state constitutional questions and the federal constitutional questions may be brought to the attention of the trial judge and will be effectively preserved, we are of the opinion, and so hold, that the person who desires to suppress evidence alleged to have been wrongfully seized may do so by making a motion similar to the motion permitted in the federal court at any time after the indictment and prior to the trial—asking the trial court to suppress the evidence on the ground that it was obtained in violation of rights under the United States Constitution.

If, however, a motion is not made prior to the trial, asking the trial court to suppress the wrongfully obtained evidence, the person desiring to have the evidence stricken may nevertheless object to the introduction of the evidence upon the federal ground and then upon the state ground, or either, during the trial and before the defendant has offered his evidence or defense. The court will then examine the federal and state claims raised by the objection so as to give a complete and effective airing of the objection, in the absence of the jury. The failure to object to the testimony and the failure to move to suppress it until after the introduction of all of the evidence for the State and defense will be considered a waiver of both federal and state questions of constitutional rights to exclude the tainted evidence. Nevertheless if it appears to the trial judge that the foregoing rule of procedure would defeat justice and bring about results not justified or intended by substantive law, the rule may be relaxed and subordinated to the primary purpose of the law to enforce constitutional rights in the interest of justice. *Dogan v. Cooley,* 184 Miss. 106, 185 So. 783 (1939).

The United States Supreme Court has returned the instant case to this Court to determine whether the defendant Aaron Henry consciously waived his rights to object to the introduction of the testimony of Ben Collins with

reference to the evidence obtained by the wrongful search of defendant's automobile on the grounds that it violated the United States Constitution. The motion of the Attorney General of Mississippi requesting this Court to remand this case to the Circuit Court of the Second Judicial District of Bolivar County, Mississippi, and thence to the County Court of the Second Judicial District of Bolivar County for a hearing to determine whether or not the defendant consciously, knowingly and intentionally waived his right under the United States Constitution to have excluded from the consideration of the jury evidence unlawfully obtained, is hereby granted.

The Clerk of this Court will certify a mandate to the County Court of the Second Judicial District of Bolivar County, Mississippi, through the Circuit Court of that District, in which the County Court is directed to proceed—on reasonable notice to Aaron Henry—to determine whether or not he consciously and intentionally waived his right to object to the illegally obtained evidence offered by the witness Ben Collins. After having heard the evidence and determined the issue, the County Court will certify its findings and determination to this Court for further proceedings in compliance with the opinion of the United States Supreme Court.

The motion of appellant, Aaron Henry, asking this Court to require the proper authorities of Mississippi to repay him the cost advanced in his behalf in the Supreme Court of the United States, is hereby continued and suspended pending the determination of the issue submitted to the County Court in the previous paragraphs of this opinion.

MOTION TO REMAND FOR HEARING SUSTAINED; AND MOTION TO REPAY COST CONTINUED.

ALL JUSTICES CONCUR.

Order of Remand, April 19, 1965

ORDERED: This cause is remanded to the County Court of the Second Judicial District of Bolivar County, Mississippi for a hearing, on reasonable notice to Aaron Henry, to determine whether or not Aaron Henry consciously and intentionally waived his right to object to the illegally obtained evidence offered by the witness Ben Collins, and the said County Court is so directed. After hearing the evidence and having determined the issue, the said County Court is directed to certify its findings and determination to the Supreme Court of Mississippi for further proceedings in compliance with the opinion of the Supreme Court of the United States. The Clerk of this Court is directed to certify the mandate to the County Court of the Second Judicial District of Bolivar County, Mississippi, through the Circuit Court of that said District. It is so Ordered.

ORDERED: The motion of the appellant, Aaron Henry, requesting this Court to require the proper authorities of Mississippi to repay him the costs advanced in his behalf in the Supreme Court of the United States, is hereby continued and suspended pending the determination of the issue submitted to the County Court in the previous next above entered.

APPENDIX D

Opinion of the Supreme Court of Mississippi July 12, 1965

RODGERS, *Justice*:

On Suggestion of Error, the original opinion in this case has been withdrawn by this Court and the following opinion is substituted in its place.

The appellant was tried and convicted in the Justice of the Peace Court of Bolivar County, Mississippi, on a charge of disorderly conduct of disturbing the peace of Sterling Lee Eilert. The charge was brought under Section 2089.5, Miss. Code 1942, Rec. On appeal to the County Court, the case was tried de novo, and appellant was again convicted. He was accordingly sentenced to serve sixty days in jail and pay a fine of $250. The Circuit Court affirmed the judgment of the County Court and appellant has appealed to this Court.

The evidence in this case reveals the following facts: On March 3, 1962, Sterling Lee Eilert "hitchhiked" (begged an automobile ride) on the various highways from his home in Memphis, Tennessee, to the intersection of Highways 49 and 61 in Clarksdale, Mississippi. He arrived at this intersection about five o'clock in the afternoon, and about 5:30 o'clock appellant stopped his automobile at this intersection and invited young Mr. Eilert to ride with him. They proceeded along Highway 61 toward Shelby, Mississippi, and after they had passed Alligator, Mississippi, appellant asked Mr. Eilert about his sex life. It is not necessary to detail the ensuing conversation. It is sufficient to say that the foregoing conversation culminated in assault upon Mr. Eilert, in that appellant reached over and touched his privates. The State witness immediately requested the appel-

lant to stop the automobile, and when it stopped, he got out and went to the back and got his suitcase. He looked at the tag on the car, and although he could not see all of the numbers on the tag, he remembered the number 1798. Mr. Eilert immediately sought the police, first by telephoning and finally by going to the police station. He gave the police a description of the automobile and the driver, as well as the numbers he saw on the tag. The officers promptly radioed Clarksdale for the name of the owner of the automobile from the records of license tags. This request was shown to have been made at 5:56 o'clock. The information was immediately given to the officers, that Aaron Henry was the owner of the automobile described by the witness.

The officers prepared an affidavit, which was signed by the witness Eilert. The affidavit was presented to the Justice of the Peace, Rowe, who issued a warrant for the arrest of defendant Aaron Henry. One of the officers took the warrant and the witness Eilert to Clarksdale and the warrant was turned over to the desk clerk at police headquarters. Notice was given to patrol cars by radio from the Clarksdale police station, notifying them to be on the lookout for appellant, Aaron Henry. This information was received by radio by officer Henry Petty at 6:04 P. M., and he immediately went to the drug store and home of Aaron Henry, but his automobile was not at the drug store or at his home. Later in the afternoon, appellant's automobile was located at his home ten or twelve minutes to seven o'clock. Notice was relayed by radio to the chief of police, who went to the home of the defendant and arrested him a few minutes before seven o'clock.

Appellant's defense to the charge was an alibi. His testimony shows that he left the drug store at 4:45 o'clock, and went to the Delta Burial Corporation. This is a funeral

home operated by John Melcher. He said he remained at the funeral home until approximately 5:20 P. M.

Defendant introduced several witnesses who testified that they saw him at the funeral home between the hours of 4:45 and 5:20. Defendant also introduced his wife and two other witnesses who testified he arrived at his home about 5:30 or 5:35 o'clock. Defendant also introduced a large number of Negro professional men, doctors, dentists, ministers and professors, as well as colored plantation owners and business men, to prove his good character.

Appellant has presented four assignments of error, on appeal, alleged to have been made in the trial of this case in the court below, but only argues three propositions, namely: (1) The assumption of jurisdiction of the cause by the trial court deprived appellant of his constitutional rights in due process. (2) The court erred in not granting a new trial to appellant on the ground that the county court permitted the State to introduce evidence obtained by an unlawful search of his automobile. (3) Appellant's conviction denied due process of law to the defendant because it rested on insufficient evidence to the essential elements of the crime, and because of error in the court's rulings.

I.

The appellant based his first assignment of error upon "the absence of competent evidence of the existence of an affidavit on March 3; 1962, the date of the commencement of prosecution of appellant. . . ." Appellant then argues that the justice of the peace had no jurisdiction to issue a warrant for the arrest of the defendant, Aaron Henry, and thereafter, the county court and circuit court had no jurisdiction of the cause because the defendant was alleged to have been convicted without due process of law.

The theme of appellant's contention is that no affidavit was made before a justice of the peace charging defendant with the crime; that in fact no warrant was issued by the justice of the peace before defendant was arrested. To sustain this thesis, appellant introduced one of his attorneys who testified (over objection of the State) that he called upon the county attorney and asked him if he had the affidavit "pursuant to" the arrest of Aaron Henry. He stated that the county attorney told him he did not have the affidavit, but that it was in the custody of Mr. Rowe, the Justice of the Peace, at Shelby. He said the county attorney advised him it would be necessary to amend the affidavit. This attorney also testified that he called the justice of the peace on the telephone and said that he was informed that he had no knowledge of the arrest of Aaron Henry, and that it did not come before him on the date of the alleged affidavit. Appellant also testified in his own behalf, stating that the warrant served on him was not the warrant in the file certified to the county court by the justice of the peace.

The testimony for the State showed the prosecuting witness Sterling Eilert signed an affidavit and that thereafter the Justice of the Peace Rowe issued the warrant charging defendant with a misdemeanor. The warrant was delivered to Officer Charles Reynolds, who, in turn, delivered it to the desk sergeant at Clarksdale, Mississippi. Chief of Police Ben C. Collins secured the warrant and served it upon the defendant at his home.

The record further reveals that the defendant's attorney admitted that an amended affidavit was properly substituted for the original which was lodged with the justice of the peace on the 14th day of March (the day the defendant was tried in the justice of the peace court). Defendant was arraigned and tried on the amended affidavit certified to the county court from a justice of the peace court. A copy of this amended affidavit was given to defendant's

attorney, and no objection was made to the amended affidavit at the time of the trial in the justice of the peace court.

The appellant points out that Section 1832, Miss. Code 1942, Rec., requires that an affidavit be lodged with the justice of the peace charging commission of a crime before warrant shall issue for arrest of an offender.

This Court has repeatedly held that an affidavit is a prerequisite to prosecution for a misdemeanor. Moreover, we have held that a justice of the peace court has no jurisdiction of a criminal charge until an affidavit has been lodged with it. See the cases cited under the above Code Section 1832. This is also the general rule accepted in a majority of jurisdictions. See: 22 C. J. S., Criminal Law, Sec. 143, p. 379; 14 Am. Jur. Criminal Law, Section 245, p. 937.

Amendments, however, are liberally allowed under our Mississippi procedure so as to bring the merits of a case fairly to trial. The following code sections are illustrative of this point. The applicable part of Section 1202, Miss. Code 1942, Rec., with reference to this subject is in the following language: "On the trial in the circuit court of any case on such appeal the affidavit charging the offense and other proceedings may be amended at any time before a verdict, so as to bring the merits of the case fairly to trial on the charge intended to be embraced in the affidavits."

Section 2535, Miss. Code 1942, Rec., is in the following language: "When an appeal is presented to the circuit court in any criminal case from the judgment or sentence of the justice of the peace or municipal court, it shall be permissible, on application of the state or party prosecuting, to amend the affidavit, pleading, or proceedings so as to bring the merits of the case fairly to trial on the charge intended to be set out in the original affidavit; the amend-

ment to be made on such terms as the court may consider proper."

The foregoing Code sections are also applicable to appeals to the county court. See Section 1617, Miss. Code 1942, Rec.

We have often held that defective affidavits on which a defendant was convicted in a justice of the peace court could be amended in the circuit court on appeal. Coulter v. State, 75 Miss. 356, 22 So. 872; Triplett v. State, 80 Miss. 379, 31 So. 743; Brown v. State, 81 Miss. 137, 32 So. 952; Mays v. State, 216 Miss. 631, 63 So. 2d 110; Simmons v. State, 179 Miss. 713, 176 So. 726; Moran v. State, 137 Miss. 435, 102 So. 388; Weddell v. Seal, Admr., 45 Miss. 726; Green v. Boone, 57 Miss. 617. See also 31 Am. Jur., Justices of the Peace, Sec. 130, p. 287. This is also accepted as the general rule. See 31 Am. Jur., Justices of the Peace, Sec. 126, p. 285.

Section 1205, Miss. Code 1942, Rec., provides the method of transmitting cases from the justice of the peace court to the circuit court or county court, and Section 1199, Miss. Code 1942, Rec. provides the form of the certificate required to be used to verify the record of the justice of the peace court on appeal.

It is universally accepted as the general rule of law that where properly authenticated or certificated records have been filed on appeal, they import absolute verity, and the record is the sole, conclusive and unimpeachable evidence of the proceedings in the court below. If the record is incomplete or incorrect, amendment, or correction, must be sought by appropriate proceedings. The record cannot be impeached collaterally by oral testimony or extrinsic evidence aliunde the record. 4A C J. S., Appeal and Error, Sec. 1143, p. 1201, *et seq.* See also 31 Am. Jur., Justices of the Peace, Sec. 126, p. 285.

In the case of Whittington v. State, 218 Miss. 631, 67

So. 2d 515, this Court pointed out the change in the law as shown by Section 1987, Miss. Code 1942, Rec., and said: "Although under Sections 1199 and 1200, Code 1942, it is still mandatory that the justice of the peace or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings, with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case, on its merits, it will still be conclusively presumed that the transcript was before the court and complied in every respect with the law. Hence no error can be predicated on that ground on appeal to this Court."

The certificate of the justice of the peace and the record in this case show a general affidavit was made on "3-3-62" charging defendant with "disturbing the peace" and that a capias was issued on "3-3-62."

In the case of Winfield v. City of Jackson, 89 Miss. 272, 42 So. 183, this Court held that where an affidavit was missing, affidavit could be supplied by oral proof on the trial.

In the case of Redus v. Campbell, 85 Miss. 165, 37 So. at 1010, we held that it was competent for the circuit court to issue the necessary process to require the justice of the peace to produce the original papers in the cause of action.

The most direct and abvious method of procedure, applicable in a case where it is sought to be shown that there was in fact no affidavit made or lodged with the justice of the peace at the time the warrant was issued, is to summon the justice of peace to bring his trial docket into court. He may then be required to testify on a preliminary motion to quash and dismiss a criminal charge against the defendant, whether or not there was in fact an affidavit filed or lodged with him.

We are therefore of the opinion that the trial court was correct in overruling the motion of appellant to quash the amended affidavit charging the defendant with a misdemeanor, although the original affidavit could not be found among the papers certified to the county court; because the record reveals there was an original affidavit lodged with the justice of peace at the time the warrant was issued.

II.

It is next contended by appellant that the court was in error in overruling his motion for a directed verdict made when the State had rested its case. The second part of this motion is based upon the proposition that the State introduced the testimony of Officer Ben C. Collins, with regard to evidence alleged to have been obtained by an unlawful search of appellant's automobile.

The record shows that Officer Collins testified that after he had arrested Aaron Henry at his home and had conveyed him to the police station, he returned to Henry's home for the purpose of examining the interior of his automobile.

He testified that he went to the door and knocked and finally Aaron Henry's wife came to the door, and he told her that he would like to look at her car and she said she would get the keys because the car was locked. The officer unlocked the car and turned the switch on, plugged the cigarette lighter in, and discovered that it would not work. He then looked in the ash tray on the right side, and found it to be filled with red Dentyne Chewing Gum wrappers. The officer then said that he asked Aaron Henry's wife and people present "Can you tell me what's in this ash tray?" He then stated: "Aaron Henry's little girl said, yes, sir, them is Dentyne Chewing Gum wrappers, I put them in there about three days ago."

This evidence corroborates the testimony of the prosecuting witness, Sterling Lee Eilert, above set out, wherein he had informed the officers of the color of the upholstery of the automobile, the fact that the lighter would not work, and the ash tray was filled with chewing gum wrappers. There had been very little evidence to corroborate the testimony of Eilert until Officer Collins testified. Charles Reynolds knew the color of the upholstery of defendant's automobile, and knew that the automobile was a "Star Chief Pontiac."

No objection was made to the testimony of Officer Collins with reference to the search at the time it was introduced and defense counsel cross-examined him about the chewing gum wrappers and the ash tray.

After careful examination of this record as a whole, we have come to the conclusion that the search of Aaron Henry's locked automobile without a search warrant, at a time when the automobile was in defendant's driveway, was an unlawful search and was in violation of Section 23, Miss. Constitution 1890.

In 1922, the Mississippi Supreme Court adopted the exclusionary rule announced in Weeks v. United States, 232 U. S. 383, in Tucker v. State, 128 Miss. 211, 90 So. 845. Since that time this Court has accumulated a great wealth of opinions which have meticulously followed the exclusionary rule rejecting testimony obtained by unlawful search and seizures.[1]

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[1] At one time the rule was firmly settled, that evidence obtained by an unreasonable, unwarranted and unlawful search and seizure, if otherwise pertinent to the issue was not rendered incompetent and inadmissible because of the wrongful method in which it was obtained. Sec. 20 Am. Jur., Evidence, § 394, p. 354. This rule passed through various stages, as shown by the following cases: Boyd v. United States, 116 U. S. 616 (1886); Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, LRA 1915B 834, Ann. Cas. 1915C 1177 (1914); Wolf v. Colorado, 338 United

(Continued on page 40a)

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III.

It is suggested by the Attorney General in the instant case that the wife of defendant consented to the search of the automobile and thereby waived the necessity of a search warrant. We prefer, however, to follow the great weight of authority which holds that a wife cannot waive the constitutional rights of her husband. We hold that appellant's wife did not waive his constitutional rights by consenting to the search of his automobile. Cofer v. United States, 37 Fed. 2d 677 (Miss. 1930); Gilliland v.

(Continued from page 39a)

States, 25 (1949); McNabb, et al. v. United States, 318 U. S. 332 (1943); Irvine v. California, 347 U. S. 128 (1954); Elkins v. United States, 364 U. S. 206 (1960); Agnello, et al. v. United States, 260 U. S. 20 (1925); Rochin v. California, 342 U. S, 165 (1952).

Finally, in the case of Mapp v. Ohio, 367 U. S. 643, 81A S. Ct. Rep. 1684, the Supreme Court of the United States held that the evidence obtained by unconstitutional search was inadmissible in state prosecutions, and vitiated state convictions by bringing the exclusionary rule established by the Fourth Amendment under the "due process" clause of the Fourteenth Amendment. The Court said: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

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IV.

As a general rule in jurisdictions which adhere to the rule denying the admissibility of evidence secured by an unlawful search and seizure, the accused must ordinarily interpose a timely challenge to the validity of the seizure and admission of evidence. 20 Am. Jur., Evidence, Sec. 396, p. 357; 23A C. J. S., Criminal Law, Sec. 1060, p. 7. In some jurisdictions, a preliminary motion is made for the suppression of evidence. In Mississippi, however, it is only necessary to object to admission of the evidence at the time it is offered. Sec. 23A C. J. S., Criminal Law, Sec. 1060, at p. 14; Holmes v. State, 146 Miss. 351, 111 So. 860.

It has been a long established procedural rule in this State that parties prejudiced by the introduction of inadmissible evidence are required to object to its admissibility at the time it is offered so that the trial judge may determine its admissibility before it is submitted to the jury. Moreover, error cannot be predicated upon admission of evidence to which no objection was made. McNutt v. State, 143 Miss. 347, 108 So. 721; Harris v. State, 153 Miss. 1, 120 So. 206; Williams v. State, 171 Miss. 324, 157 So. 717; Dick, Aleck and Henry, Slaves v. State, 30 Miss. 593; Loftlin v. State, 150 Miss. 228, 116 So. 435; Holmes v. State, 146 Miss. 351, 111 So. 860; Carr v. State, 187 Miss. 535, 192 So. 569; Wright v. State, 212 Miss. 491, 54 So. 2d 735.

We have also held that a motion to exclude inadmissible testimony at the conclusion of the evidence comes too late. Harris v. State, supra; Dick v. State, supra; Peters v. State, 106 Miss. 333, 63 So. 666.

We have therefore reached the conclusion that since the defendant made no objection to the introduction of the

illegally obtained evidence, at the time it was offered, he waived his right to object to such evidence and error cannot now be predicated upon the failure of the trial judge to exclude such evidence from the consideration of the jury. Johnson v. State, 220 Miss. 452, 70 So. 2d 926; Baggett v. State, 219 Miss. 583, 69 So. 2d 389; Gillespie v. State, 215 Miss. 380, 61 So. 2d 150; Bennett v. State, — Miss. —, 52 So. 2d 837; White v. State, 202 Miss. 246, 30 So. 2d 894; Poole v. State, 231 Miss. 1, 94 So. 2d 239.

We are of the further opinion that this case does not come within the rule announced by this Court in Brooks v. State, 209 Miss. 150, 46 So. 2d 94, because there is no substantial basis upon which it can be said that the appellant's counsel in this trial were so inadequate that they permitted a judicial farce to be accomplished. These three attorneys, namely, a Mississippi lawyer and two others out of New York City, possess high literary and legal attainments, and are all experienced trial lawyers. They were chosen by the appellant and he has made no complaint of inadequacy against them. A reading of this record demonstrates that their positions were at all times highly adversary in behalf of their client, and that judicial character was present in the proceedings at all times. In such circumstances, even if honest mistakes of counsel in respect to policy or strategy or otherwise occur, they are binding upon the client as a part of the hazards of courtroom battle. On this principle, compare the following cases from other jurisdictions: Woodell v. Maryland, 162 A. 2d 468 (1960); Wilson v. State, 51 N. E. 2d 848 (1943), an Indiana case; Hendrickson v. State, 118 N. E. 2d 493 (1954), an Indiana case; People v. Robinson, 177 N. E. 2d 132 (1961), an Illinois case; O'Malley v. U. S., 285 Fed. 2d 733 (6th Cir.); Lotz v. Sacks, 292 Fed. 2d 657 (C. A. 6th Ohio); Popeko v. U. S., 294 Fed. 2d 168 (1961); U. S. v. Handy, 203 Fed. 2d 407 (3rd Cir. 1953); Arellanes v. U. S., 302 Fed. 2d 603 (C. A. 9 1962).

Moreover, the defendant without objecting to the illegally obtained evidence, proceeded to cross-examine the State witnesses as to the evidence he now claims should not have been admitted so as to fully develop all the facts. He also introduced the same evidence by his own witnesses including photographs of the interior of the car. We are, therefore, of the further opinion that the admission of such evidence, unlawfully obtained, if error, was cured by the introduction of the same testimony by the defendant and he is estopped to complain that such evidence was erroneously admitted in the trial for the consideration of the jury. Prine v. State, 158 Miss. 435, 130 So. 687; Weatherford v. State, 164 Miss. 888, 143 So. 853; Smith v. State, 166 Miss. 893, 144 So. 471; Musslewhite v. State, 212 Miss. 526, 54 So. 2d 911; Spivey v. State, 212 Miss. 648, 55 So. 2d 404; Barnes v. State, 164 Miss. 126, 143 So. 475; Sykes v. City of Crystal Springs, 216 Miss. 18, 61 So. 2d 387.

V.

We do not believe that there is any merit in the contention of appellant that the evidence is insufficient to support a verdict of guilty. The defense offered by appellant was an alibi, and we are of the opinion that such evidence was a question for the determination of the jury. Prisock v. State, — Miss. —, 141 So. 2d 711; Cobb v. State, 235 Miss. 57, 108 So. 2d 719; Passons v. State, 239 Miss. 629, 124 So. 2d 847.

The former judgment reversing this case for a new trial is hereby set aside and a judgment will be entered affirming the judgment and sentence of the Circuit Court. The judgment of the lower court is therefore affirmed.

Suggestion of error sustained, former opinion withdrawn and new opinion rendered affirming judgment of lower court.

All justices concur.

Judgment—Supreme Court of Mississippi
July 12, 1963

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be sustained doth order and adjudge that said suggestion of error be and the same is hereby sustained, the former opinion withdrawn, a new opinion entered, and the following entered as the final judgment in this cause affirming the case, To-wit: This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Bolivar County, Second District, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 20th day of November, 1962—a conviction of disorderly conduct under Section 2089.5 of the Mississippi Core of 1942 Recompiled and a sentence to pay a fine of $250.00 and costs and to serve a term of 60 days in jail—he and the same is hereby affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant, Aaron Henry, and Dr. E. P. Burton and Rev. Isaac Daniel, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Opinion of the Supreme Court of Mississippi
June 3, 1963

RODGERS, *Justice*:

The appellant was tried and convicted in the Justice of the Peace Court of Bolivar County, Mississippi, on a charge of disorderly conduct of disturbing the peace of Sterling Lee Eilert. The charge was brought under § 2089.5, Miss. Code 1942, Rec. On appeal to the County Court, the case was tried de novo, and appellant was again convicted. He was accordingly sentenced to serve sixty days in jail and pay a fine of $250. The Circuit Court affirmed the judgment of the County Court and appellant has appealed to this Court.

The evidence in this case reveals the following facts: On March 3, 1962, Sterling Lee Eilert "hitchhiked" (begged an automobile ride) on the various highways from his home in Memphis, Tennessee, to the intersection of Highways 49 and 61 in Clarksdale, Mississippi. He arrived at this intersection about five o'clock in the afternoon, and about 5:30 o'clock appellant stopped his automobile at this intersection and invited young Mr. Eilert to ride with him. They proceeded along Highway 61 toward Shelby, Mississippi, and after they had passed Alligator, Mississippi, appellant asked Mr. Eilert about his sex life. It is not necessary to detail the ensuing conversation. It is sufficient to say that the foregoing conversation culminated in assault upon Mr. Eilert, in that appellant reached over and touched his privates. The State witness immediately requested the appellant to stop the automobile, and when it stopped, he got out and went to the back and got his suitcase. He looked at the tag on the car, and although he could not see all of the numbers on the tag, he remembered the number 1798. Mr. Eilert immediately sought the police, first by telephoning and finally by going to the police station. He gave the police a description of the automobile and the driver, as

well as the numbers he saw on the tag. The officers promptly radioed Clarksdale for the name of the owner of the automobile from the records of license tags. This request was shown to have been made at 5:56 o'clock. The information was immediately given to the officers, that Aaron Henry was the owner of the automobile described by the witness.

The officers prepared an affidavit, which was signed by the witness Eilert. The affidavit was presented to the Justice of the Peace, Rowe, who issued a warrant for the arrest of defendant Aaron Henry. One of the officers took the warrant and the witness Eilert to Clarksdale and the warrant was turned over to the desk clerk at police headquarters. Notice was given to patrol cars by radio from the Clarksdale police station, notifying them to be on the lookout for appellant, Aaron Henry. This information was received by radio by officer Henry Petty at 6:04 P. M., and he immediately went to the drug store and home of Aaron Henry, but his automobile was not at the drug store or at his home. Later in the afternoon, appellant's automobile was located at his home ten or twelve minutes to seven o'clock. Notice was relayed by radio to the chief of police, who went to the home of defendant and arrested him a few minutes before seven o'clock.

Appellant's defense to the charge was an alibi. His testimony shows that he left the drug store at 4:45 o'clock, and went to the Delta Burial Corporation. This is a funeral home operated by John Melcher. He said he remained at the funeral home until approximately 5:20 P. M.

Defendant introduced several witnesses who testified that they saw him at the funeral home between the hours of 4:45 and 5:20. Defendant also introduced his wife and two other witnesses who testified he arrived at his home about 5:30 or 5:35 o'clock. Defendant also introduced a large number of Negro professional men, doctors, dentists, ministers and professors, as well as colored plantation owners and business men, to prove his good character.

Appellant has presented four assignments of error, on appeal, alleged to have been made in the trial of this case in the court below, but only argues three propositions, namely: (1) The assumption of jurisdiction of the cause by the trial court deprived appellant of his constitutional rights to due process. (2) The court erred in not granting a new trial to appellant on the ground that the county court permitted the State to introduce evidence obtained by an unlawful search of his automobile. (3) Appellant's conviction denied due process of law to the defendant because it rested on insufficient evidence of the essential elements of the crime, and because of error in the court's rulings.

I.

The appellant based his first assignment of error upon "the absence of competent evidence of the existence of an affidavit on March 3, 1962, the date of the commencement of prosecution of appellant. . . ." Appellant then argues that the justice of the peace had no jurisdiction to issue a warrant for the arrest of the defendant, Aaron Henry, and thereafter, the county court and circuit court had no jurisdiction of the cause because the defendant was alleged to have been convicted without due process of law.

The theme of appellant's contention is that no affidavit was made before a justice of the peace charging defendant with the crime; that in fact no warrant was issued by the justice of the peace before defendant was arrested. To sustain this thesis, appellant introduced one of his attorneys who testified (over objection of the State) that he called upon the county attorney and asked him if he had the affidavit "pursuant to" the arrest of Aaron Henry. He stated that the county attorney told him he did not have the affidavit, but that it was in the custody of Mr. Rowe, the Justice of the Peace, at Shelby. He said the county attorney advised him it would be necessary to amend the affi-

davit. This attorney also testified that he called the justice of the peace on the telephone and said that he was informed that he had no knowledge of the arrest of Aaron Henry, and that it did not come before him on the date of the alleged affidavit. Appellant also testified in his own behalf, stating that the warrant served on him was not the warrant in the file certified to the county court by the justice of the peace.

The testimony of the State showed the prosecuting witness Sterling Eilert signed an affidavit and that thereafter the Justice of the Peace Rowe issued the warrant charging defendant with a misdemeanor. The warrant was delivered to Officer Charles Reynolds, who, in turn, delivered it to the desk sergeant at Clarksdale, Mississippi. Chief of Police Ben C. Collins secured the warrant and served it upon the defendant at his home.

The record further reveals that the defendant's attorney admitted that an amended affidavit was properly substituted for the original which was lodged with the justice of the peace on the 14th day of March (the day defendant was tried in the justice of the peace court). Defendant was arraigned and tried on the amended affidavit certified to the county court from a justice of the peace court. A copy of this amended affidavit was given to defendant's attorney, and no objection was made to the amended affidavit at the time of the trial in the justice of the peace court.

The appellant points out that § 1832, Miss. Code 1942, Rec., requires that an affidavit be lodged with the justice of the peace charging commission of a crime before warrant shall issue for arrest of an offender.

This Court has repeatedly held that an affidavit is a prerequisite to prosecution for a misdemeanor. Moreover, we have held that a justice of the peace court has no jurisdiction of a criminal charge until an affidavit has been

lodged with it. See the cases cited under the above Code § 1832. This is also the general rule accepted in a majority of jurisdictions. See: 22 C. J. S., Criminal Law, § 143, p. 379; 14 Am. Jur., Criminal Law, § 245, p. 937.

Amendments, however, are liberally allowed under our Mississippi procedure so as to bring the merits of a case fairly to trial. The following Code sections are illustrative of this point. The applicable part of § 1202, Miss. Code 1942, Rec., with reference to this subject is in the following language: "On the trial in the circuit court of any case on such appeal the affidavit charging the offense and other proceedings may be amended at any time before a verdict, so as to bring the merits of the case fairly to trial on the charge intended to be embraced in the affidavit."

Section 2535, Miss. Code 1942, Rec., is in the following language: "When an appeal is presented to the circuit court in any criminal case from the judgment or sentence of the justice of the peace or municipal court, it shall be permissible, on application of the state or party prosecuting, to amend the affidavit, pleading, or proceedings so as to bring the merits of the case fairly to trial on the charge intended to be set out in the original affidavit; the amendment to be made on such terms as the court may consider proper."

The foregoing Code sections are also applicable to appeals to the county court. See § 16178, Miss. Code 1942, Rec.

We have often held that defective affidavits on which a defendant was convicted in a justice of the peace court could be amended in the circuit court on apeal. Coulter v. State, 75 Miss. 356, 22 So. 872; Triplett v. State, 80 Miss. 379, 31 So. 743; Brown v. State, 81 Miss. 137, 32 So. 952; Mays v. State, 216 Miss. 631, 63 So. 2d 110; Simmons v. State, 179 Miss. 713, 176 So. 726; Moran v. State, 137 Miss. 435, 102 So. 388; Weddell v. Seal, Admr., 45 Miss.

726; Green v. Boone, 57 Misc. 617. See also 31 Am. Jur., Justices of the Peace, § 130, p. 287. This is also accepted as the general rule. See 31 Am. Jur., Justices of the Peace, § 126, p. 285.

Section 1205, Miss. Code 1942, Rec., provides the method of transmitting cases from the justice of the peace court to the circuit court or county court, and § 1199, Miss. Code 1942, Rec. provides the form of the certificate required to be used to verify the record of the justice of the peace court on appeal.

It is universally accepted as the general rule of law that where properly authenticated or certificated records have been filed on appeal, they import absolute verity, and the record is the sole, conclusive and unimpeachable evidence of the proceedings in the court below. If the record is incomplete or incorrect, amendment, or correction, must be sought by appropriate proceeding. The record cannot be impeached collaterally by oral testimony or extrinsic evidence aliunde the record. 4A C. J. S., Appeal and Error, § 1143, p. 1201, *et seq.* See also 31 Am. Jur., Justices of the Peace, § 126, p. 285.

In the case of Whittington v. State, 218 Miss. 631, 67 So. 2d 515, this Court pointed out the change in the law as shown by § 1987, Miss. Code 1942, Rec., and said: "Although under Sections 1199 and 1200, Code 1942, it is still mandatory that the justice of the peace or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case, on its merits, it will still be conclusively presumed that the transcript was before the court and complied in every respect with the law. Hence no error can be predicated on that ground on appeal to this Court."

The certificate of the justice of the peace and the record in this case show a general affidavit was made on "3-3-62" charging defendant with "disturbing the peace" and that a capias was issued on "3-3-62."

In the case of Winfield v. City of Jackson, 89 Miss. 272, 42 So. 183, this Court held that where an affidavit was missing, affidavit could be supplied by oral proof on the trial.

In the case of Redus v. Campbell, 85 Miss. 165, 37 So. at 1010, we held that it was competent for the circuit court to issue the necessary process to require the justice of the peace to produce the original papers in the cause of action.

The most direct and obvious method of procedure, applicable in a case where it is sought to be shown that there was in fact no affidavit made or lodged with the justice of the peace at the time the warrant was issued, is to summon the justice of peace to bring his trial docket into court. He may then be required to testify on a preliminary motion to quash and dismiss a criminal charge against the defendant, whether or not there was in fact an affidavit filed or lodged with him.

We are therefore of the opinion that the trial court was correct in overruling the motion of appellant to quash the amended affidavit charging the defendant with a misdemeanor, although the original affidavit could not be found among the papers certified to the county court; because the record reveals there was an original affidavit lodged with the justice of peace at the time the warrant was issued.

II.

It is next contended by appellant that the court was in error in overruling his motion for a directed verdict, made when the State had rested its case. The second part of this motion is based upon the proposition that the State introduced the testimony of Officer Ben C. Collins, with regard to evidence alleged to have been obtained by an unlawful search of appellant's automobile.

The record shows that Officer Collins testified that after he had arrested Aaron Henry at his home and had conveyed him to the police station, he returned to Henry's home for the purpose of examining the interior of his automobile.

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a time when the automobile was in defendant's driveway, was an unlawful search and was in violation of § 23, Miss. Constitution, 1890.

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had come to rest at the completion of the journey. See also Brooks v. State, 209 Miss. 150, 46 So. 2d 94. Cf. Smith v. State, 240 Miss. 738, 128 So. 2d 857.

III.

It is suggested by the Attorney General in the instant case that the wife of defendant consented to the search of the automobile and thereby waived the necessity of a search warrant. We prefer, however, to follow the great weight of authority which holds that a wife cannot waive the constitutional rights of her husband. We hold that appellant's wife did not waive his constitutional rights by consenting to the search of his automobile. Cofer v. United States, 37 Fed. 2d 677 (Miss. 1930); Gilliland v. Commonwealth, 224 Ky. 453, 6 S. W. 2d 467; Hays v. State, 261 P. 232 (Okla.); Rose v. State, 254 P. 509 (Okla.); 47 Am. Jur., Search and Seizures, § 72, p. 548. Cf. Brewer v. State, 142 Miss. 100, 107 So. 376.

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It has been a long established procedural rule in this State that parties prejudiced by the introduction of inadmissible evidence are required to object to its admissibility at

the time it is offered so that the trial judge may determine its admissibility before it is submitted to the jury. Moreover, error cannot be predicated upon admission of evidence to which no objection was made. McNutt v. State, 143 Miss. 347, 108 So. 721; Harris v. State, 153 Miss. 1, 120 So. 206; Williams v. State, 171 Miss. 324, 157 So. 717; Dick, Aleck, and Henry, Slaves v. State, 30 Miss. 593; Loftin v. State, 150 Miss. 228, 116 So. 435; Holmes v. State, 146 Miss. 351, 111 So. 860; Carr v. State, 187 Miss. 535, 192 So. 569; Wright v. State, 212 Miss. 491, 54 So. 2d 735.

We have also held that a motion to exclude inadmissible testimony at the conclusion of the evidence comes too late. Harris v. State, supra; Dick v. State, supra; Peters v. State, 106 Miss. 333, 63 So. 666.

In the instant case, the motion made by the defnse attorney at the close of the State's testimony did not request the court to exclude the testimony alleged to have been wrongfully obtained. The motion requested a directed verdict, or that the case be dismissed against defendant because some of the testimony introduced was obtained illegally. In short, under ordinary circumstances error could not be predicated upon the admission of such testimony.

It appears from the records reaching this Court that numerous cases have been tried recently in this State by nonresident attorneys who have traveled great distances to appear in defense of persons charged with misdemeanors and minor offenses, but who are not adept in the technique of jury trials in criminal court in Mississippi. This Court is conscious of the fact that such a situation has cast an unusual burden upon the trial judges to determine how to eliminate objectionable testimony, when no objection is made, and at the same time insure a fair trial by due process of law, as required by Article 3, § 14, Miss. Constitution, 1890.

In the case of Brooks v. State, 209 Miss. 150, 146 So. 2d 94, this Court pointed out that in a narrow class of cases where

fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had, and the Court said: "Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal."

In the case of Brown v. State of Mississippi, 297 U. S. 278 (173 Miss. 542, 158 So. 339), where a confession had been obtained by duress, and the Mississippi Supreme Court sustained the conviction on the grounds that (1) immunity from self-incrimination is not essential to due process of law, and (2) failure of the trial court to exclude confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude confessions, the ruling would have been mere error, reversible on appeal, but not a violation of a constitutional right. The United States Supreme Court said: "In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner." The case was therefore reversed.

In the instant case, we are of the opinion that a new trial should be granted because appellant's case is based primarily upon his identity. Testimony of the State's witness, Sterling Lee Eilert, is, in effect, uncorroborated without the evidence disclosed by the inspection of defendant's automobile. The unlawfully obtained evidence leases no room to doubt that the witness Eilert had been in defend-

ant's automobile. The admission of the evidence obtained by the search of defendant's automobile thus prevented him from obtaining a fair trial, as guaranteed to all persons in courts of Mississippi. Section 14, Miss. Constitution, 1890. We therefore hold that this case comes within the narrow rule set out in Brooks v. State, supra.

V.

We do not believe that there is any merit in the contention of appellant that the evidence is insufficient to support a verdict of guilty. The defense offered by the appellant was an alibi, and we are of the opinion that such evidence was a question for the determination of the jury. Prisock v. State, —— Miss. ——, 141 So. 2d 711; Cobb v. State, 235 Miss. 57, 108 So. 2d 719; Passons v. State, 239 Miss. 629, 124 So. 2d 847.

The judgment of the lower court is reversed and the case is remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

LEE, P. J., AND KYLE, ARRINGTON AND ETHRIDGE, JJ., concur.

Judgment—June 3, 1963

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Bolivar County, Second District, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause of the 20th day of November 1962—a conviction of disorderly conduct under Section 2089.5 of the Mississippi Code of 1942 Recompiled and a sentence to pay a fine of $250.00 and costs and to serve 60 days in jail—be and the same is hereby adjudged that the Costs of the Clerk of this Court be paid out of the appropriation provided for cases in which the State Fails.

SUPREME COURT, U. S.

MAY 27 1968

JOHN F. DAVIS, CLERK

NO. 1090

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

AARON HENRY ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

RESPONSE TO PETITION FOR CERTIORARI

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Comes the State of Mississippi and for response to the Petition for Certiorari filed herein says:

In *Henry v. Mississippi*, 379 U.S. 443, 446, 85 S. Ct. 564, 566, 13 L. Ed. 2d 408 (1965), this Court said:

> "We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decisions of his Federal claim when timely objection was not made to the admission of the illegally seized evidence."

At 379 U.S. 451, 452, 85 S. Ct. 569, 13 L. Ed. 2d 414, 415, this Court suggested that the actions of defendant's counsel in not objecting to the admissibility of the evidence obtained as a result of the search of petitioner's car was a strategic move and stated that if that were true, it would be binding on defendant. The Court said:

> "The evidence suggests reasons for a strategic move. Both the complaining witness and the police officer testified that the cigarette lighter in the car did not

work. After denial of its motion for a directed verdict the defense called a mechanic who had repaired the cigarette lighter. The defense might have planned to allow the complaining witness and the officer to testify that the cigarette lighter did not work, and then, if the motion for directed verdict were not granted, to discredit both witnesses by showing that it did work, thereby persuading the jury to acquit. Or, by delaying objection to the evidence, the defense might have hoped to invite error and lay the foundation for a subsequent reversal. If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see Whittus v. Balkcom, 333 F. 2d 496 (C.A. 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case." 379 U.S. 451, 452, 85 S. Ct. 569, 13 L. Ed. 2d 414, 415 (1965).

Upon remand to the trial court an evidentiary hearing was had and the trial court sustained petitioner's objection to his testifying and to his attorney testifying. While the objections did not so specify, it is obvious that the former was on the ground of self-incrimination and the latter on the ground of privileged communication between attorney and client. The trial court, erroneously we say, sustained the objections and only allowed testimony by appellant's attorney, Brown, to the effect that

he and the other attorneys who represented appellant at his trial were all present in Justice of the Peace Court where appellant was originally tried and that the evidence obtained as a result of the search of petitioner's car was presented at that original trial, thus charging petitioner and his counsel with knowledge of the existence of the evidence and its probable use on trial de novo in the County Court of Bolivar County, Mississippi. The trial court then found that the State had failed to prove that either petitioner or his counsel had deliberately bypassed the contemporaneous objection rule in Mississippi.

Upon review of that finding by the Supreme Court of Mississippi, that Court found as a fact that the State met the burden of proving that defendant's counsel deliberately waived objection to the evidence as a strategic move and that in the absence of any attempt whatever to rebut the compelling inference that the failure to object was deliberate, there was a waiver. The State produced all the evidence it had, and that evidence pointed clearly to a waiver. As commented on by the Mississippi Supreme Court;

> "All evidence to the contrary is within the sole possession of defendant and his counsel. They have not been willing to reveal what really took place at defendant's end of the counsel table. They should not now be heard to say that there was no waiver." Henry v. State, 198 So. 2d 213, 218, (Miss. 1967).

This Court will recall that at all stages throughout the several years that this case has been in litigation the State of Mississippi has challenged appellant and his several counsel to come forward by affidavit to the effect that either one of them did not know of the necessity

of objecting to this evidence and this Court commented on that fact. "What really took place at defendant's end of the counsel table" is locked within the collective minds of petitioner and his three counsel and they do not appear to be willing for the truth to prevail.

Therefore, as reasoned by the Mississippi Supreme Court, the only possible inference that can be drawn from petitioner and his counsel not being willing to testify is that their testimony would be against petitioner's interest.

While the Mississippi Supreme Court rightly makes a distinction between the privilege that exists between communications between attorney and client, doctor and patient, and husband and wife, the law in Mississippi is that if, as between doctor and patient, a patient-litigant claims the privilege and refuses his adversary the right to examine his physician, the jury can be instructed that they would be justified in inferring that the physician's testimony would have been unfavorable to him. *Killings v. Metropolitan Life Ins. Co.*, 187 Miss. 265, 192 So. 577, 131 ALR 684; *Gulf Refining Company v. Myrick*, 220 Miss. 429, 71 So. 2d 217 (1954). The same rule of inference should apply to the case at bar in support of the decision of the Mississippi Supreme Court in its finding of a deliberate waiver.

CONCLUSION

Wherefore, it is respectfully submitted that the petition herein should be dismissed and a judgment entered affirming the judgment of the Mississippi Supreme Court.

Respectfully submitted,

JOE T. PATTERSON, *Attorney General*

BY G. GARLAND LYELL, JR.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Response to Petition for Certiorari to Hon. Barbara A. Morris, Attorney at Law, 1790 Broadway, New York, New York 10019 and Honorable Jack Young, Attorney at Law, 115½ N. Farish Street, Jackson, Mississippi.

This the 23rd day of May, A. D., 1968.

Assistant Attorney General